Chapter 8

Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance

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> Short of simply preventing an activity, supervising, controlling and restraining its performance necessarily involves a degree of participation in the activity. ... The danger in this is not that the supervisor will become the performer … but that the values of the supervisor will come to dominate performance, thus breaking the tension between supervision and performance.[1]

8.1 Introduction

This chapter focuses on the relationship between the *supervisor* and *performer* in the review of, or appeal from, administrative decisions which are regulatory in character.[2] In particular, this project will explore whether and

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1 Peter Cane *Administrative Tribunals and Adjudication* (Hart Publishing, Oxford, 2009) at 142–143.

2 For a discussion regarding consultation over administrative decisions see Mark Bennett and Joel Colón-Ríos chapter "Public Participation and Regulation" in this volume (ch 2).

when appellate review of such decisions is appropriate and, if it is appropriate, in what form. As a necessary part of that inquiry we also examine the complementary (or, if no provision is made for appellate review, "default") judicial oversight mechanism: judicial review. We are particularly concerned with the circumstances in which the supervision targets, or should target, the substance or *merits* of regulatory decisions and any peculiarly New Zealand dimensions to that question. We do so against the background of calls for increased deployment of appeal on the merits, most vividly seen in the Regulatory Standards Bill (the Bill) introduced into Parliament in 2011.[3]

The overarching purpose of this project is to analyse and reflect on the performance–supervision dynamic within New Zealand's administrative law setting and jurisprudence. Our goal is two-fold. First, we consider whether it is possible to offer generalised conclusions about the most appropriate form for supervision of regulatory decisions, particularly the appropriateness of providing for an appeal on the merits. Secondly, anticipating the need for a contextual approach, we aim to identify and expand upon the key considerations which impact on this question.

Within the broader work of the New Zealand Law Foundation Regulatory Reform Project, the issue of appeal and review of regulatory decisions can be considered a matter of "little policy".[4] That is, we are concerned with an aspect of how best to translate policy into a legal framework.[5] We are not concerned with the substantive content or direction of policy in any particular area of regulation, but rather the question of how best to implement and give effect to "big policy". The lodestar for our analysis is, therefore, the need to ensure the framework for judicial supervision, on the one hand, provides adequate checks-and-balances on the exercise of regulatory power and, on the other hand, remains faithful to, and does not unduly interfere with, the policy objectives underlying any particular area of regulation.

Our primary audience is those involved in designing the processes for the supervision of regulatory decisions. This audience can be broken into two broad groups. The first group is composed of those involved in developing the relevant statutory regimes (typically, but not always, through the provision of a statutory appeal). This group includes drafters, policy-makers, legislators and other stakeholders who participate in the development of these regimes.[6] The second group comprises those responsible for interpreting the statutory

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3 See the discussion of the Bill in at [8.3].

4 This term is borrowed from the Treasury lexicon, where we are told it has been in use for at least two decades.

5 See, for example, the discussion in George Tanner "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts" (2010) 6:2 *Policy Quarterly* 21 at 22, under the heading "The importance of having good law".

6 See Derek Gill "Regulatory Management in New Zealand: What, Why and How?" in this volume (ch 7).

scheme or developing common law principles which have the effect of defining the nature of the supervisory function. Most obviously this includes the judges responsible for defining the judicial method to be applied in common law judicial review and on appeal, along with the lawyers who argue such cases. Judges are also responsible for defining the appropriate judicial method for statutory appeals where legislation does not definitively prescribe the appropriate method. Both groups together might be able to be described as the *designers*.

This chapter forms part of the first stage of the Regulatory Reform Project and is therefore an exploratory one which aims to identify and scope the relevant issues. Later stages of the project will contain more detailed analysis of the performance–supervision dynamic and key considerations bearing on the appropriateness of the different forms of appeal and review. In this chapter, we introduce the key concepts within the performance–supervision relationship. We identify the participants in this dynamic and characterise the regulatory decisions subject to supervision. We then identify the different methodologies within both review and appeal, to demonstrate the pluralistic suite of supervision options available as part of the existing status quo and to gauge their respective intensities of review. We close by offering some reflection on the appropriateness of collapsing this diverse and context-sensitive set of supervision methodologies, and instead favouring one particular approach, as is proposed in the Bill.

8.2 Key concepts: what? who? by whom? how?

In New Zealand, there has been a recurrent argument for merits review of regulatory decisions,[7] as exemplified by the provisions of the Bill discussed below. We begin by locating the plea for appeal on the merits from regulatory decisions within its wider context, particularly the New Zealand context.[8] First, it is necessary to appreciate the form and character of regulatory decisions. What do we mean by a "regulatory" decision – the *what* question. Closely related to this is the *who* question: who makes these regulatory decisions? Or, framed in the negative, whose decisions are being challenged? The answers to these questions contribute to our understanding of the first limb of the performance-supervision dynamic and allow us to consider whether the request for an appeal on the merits from regulatory decisions is capable of a generalised response.

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7 See, for example: David Round "The Merits of Merits Reviews" [2006] NZLJ 237; David Goddard QC "Regulatory Error: Review and Appeal Rights" (paper presented to the Legal Research Foundation Conference, Auckland, September 2006).

8 For a prominent instance in which the plea was responded to see the merits appeals in Part 4 of the Commerce Act 1986: Commerce Act 1986, ss 52Z-53.

Secondly, the supervision limb must be delineated. Answering the *by whom* question identifies our focus in this project on judicial supervision (or review by independent tribunals which is similar in character). In doing so, we locate this formal judge-based, accountability mechanism amongst the broader suite of accountability mechanisms within administrative law. We then examine the two different forms of judicial supervision – appeal and review – to address the *how* question. This allows us to chart the contours of appeal and review, providing some comparative context to assess the call for appeal on the merits. In doing so, we focus on the main differences between appeal and review, as well as identify the different judicial methodologies within each form of judicial supervision.

As part of our cartography of the regulatory arena, we have commenced an empirical survey of the appeals and reviews of regulatory decisions. The purpose is to develop a clear profile of the performance-supervision dynamic in New Zealand over the last decade, providing empirical data to test and inform the discursive analysis. So far, the survey is only partial and provisional; it is our intention to present a much fuller study as part of future stages of this project. Nevertheless, while the study is in its formative stages, we have been able to draw on some of the data to help sketch in more general terms the character of the regulatory field.

8.2.1 *What: the types of regulatory decisions*

We approach the definition of *regulatory decision* by first defining the field, regulation, and then providing illustrative examples of decisions made in that context. *Regulation* has both narrow and broad connotations.[9] Regulation has been defined broadly as the "legal rules which seek to steer the behaviour of mainly private citizens and companies",[10] or the implementation or enforcement of "prescriptive controls over particular kinds of social and economic activities, if necessary through the application of sanctions".[11] We have adopted a similarly broad conception of regulation,[12] rather than

9 See, for example, Bronwyn Morgan and Karen Yeung *An Introduction to Law and Regulation* (Cambridge University Press, Cambridge, 2007) at 3; Richard Rawlings "Testing Times" in Dawn Oliver, Tony Prosser and Richard Rawlings (eds) *The Regulatory State: Constitutional Implications* (Oxford University Press, New York, 2010) at 2.

10 Bettina Lange "Regulation" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, New York, 2008) at 996.

11 Karen Yeung, "Regulatory Agencies" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, New York 2008) at 998. See also Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" in this volume (ch 2).

12 For the adoption of a broad definition, see House of Lords Select Committee on the Constitution *The Regulatory State: Ensuring its Accountability* (HL Paper 68–I, 2004) at [22]*;* Law Commission "Submission to the Commerce Committee on the Regulatory Responsibility Bill 2006"; David Goddard QC "Public Law and Regulation" in New Zealand Law Society *Administrative Law – The Public Law Scene in 2011* (New Zealand Law Society, Wellington, 2011) at 113. The latter two New Zealand sources refer to Anthony Ogus

focusing solely on rule-making or application in a particular regulatory sphere, such as economic or commercial regulation.[13]

Similarly, our focus is not confined to the application of rules by regulators, but also includes rule-making where the regulator has been delegated or has assumed that function. The performance-supervision dynamic is also engaged in the promulgation of regimes of rules by regulators, albeit that it may operate slightly differently in relation to the review of a law-making function.

This wide brief means the examination of the performance-supervision relationship needs to recognise the broad range of decisions being made and reviewed. This may include the promulgation by a regulator of specific rules or codes which regulate social or economic activity, or specific decisions made by a regulator approving or declining such activities.

Some illustrative examples include decisions such as:

- authorisation of restrictive trade practices or clearance of mergers;[14]
- promulgation of price controls;
- approval of the use or release of genetically-modified organisms;
- development of plans regulating land-use and other activities;
- consenting of developments, including assessment against established codes;
- promulgation of bylaws regulating land-use and other activities;
- development and application of rules restricting land-ownership or overseas investment;[15]
- development of broadcasting standards and application of those standards to complaints;
- licensing of primary industries and any associated domestic quota allocation;[16]
- development, and application, of immigration entry criteria;
- licensing of insalubrious trades, such as the sale of liquor and gambling;
- promulgation of entry requirements and standards for certain professions and subsequent enforcement of requirements through disciplinary proceedings.

Regulation: Legal Form and Economic Theory (Hart Publishing, Oxford, 2004). Ogus adopts the definition of regulation as "sustained and focused control exercised by a public agency over activities that are valued by a community".

13 For a narrower definition based on commercial or market regulation, see Jaime Arancibia *Judicial Review of Commercial Regulation* (Oxford University Press, New York, 2011) at 2; and Tony Prosser *Law and Regulators* (Clarendon Press, Oxford, 1997) at 4.

14 See Paul Scott "Competition Law and Policy" in this volume (ch 3).

15 See Richard Boast and Neil Quigley "Regulation, Property and the Rule of Law" and Daniel Kalderimis "Regulating Foreign Investment in New Zealand", both in this volume (ch 5 and ch 16, respectively).

16 See the discussion of fishing licences in Richard Boast and Neil Quigley "Regulation, Property and the Rule of Law" in this volume (ch 5).

The list makes evident the diverse nature of regulatory decisions.

8.2.2 *Who: the bodies and officials who make regulatory decisions*

The plurality of regulatory decisions is matched by the plurality of decision-makers. The body or official charged with making a regulatory decision varies widely. Here we exclude from our project those regulatory decisions ultimately made by Parliament through legislation, which are not capable of being reviewed or appealed. Our focus is on those regulatory functions delegated by Parliament to a Minister, public body, regulatory agency, or official. Or, in some cases, self-regulation undertaken by private bodies, where Parliament has chosen not to impose a public form of regulation.[17]

Some illustrative examples include:

- Ministers and public service officials;
- local authorities;
- other public bodies such as the Commerce Commission, the Electricity Commission,[18] the Environmental Risk Management Authority, the Office of Film and Literature Classification, the Overseas Investment Office, the Civil Aviation Authority, the Legal Services Agency, the Takeovers Panel, the Pharmaceutical Management Agency,[19] the Liquor Licensing Authority, the Broadcasting Standard Authority, and the Immigration and Protection Tribunal; and
- professional bodies such as the law societies, the Medical Council, and the Plumbers, Gasfitters and Drainlayers Board.

8.2.3 *By whom: who is responsible for supervising the regulators?*

This paper focuses on judicial supervision through the mechanism of judicial review and statutory appeals. These are two different court-centred mechanisms for dealing with disputes between government and the governed and ensuring that a decision maker is responsible for his or her decisions. Appeal and review represent the most overt and formal accountability processes for regulatory decisions. They are also the control mechanisms which are increasingly subject to criticism and debate.

We acknowledge that judicial supervision is by no means the only accountability mechanism applying to regulatory decisions. There are also a

17 For a more detailed discussion of delegated legislative decision-making, see Petra Butler "Rights and Regulation" in this volume (ch 9).

18 See Alec Mladenovic "Network Industries Case Study: Electricity and Telecommunication" in this volume (ch 13).

19 See Susy Frankel and Meredith Kolsky Lewis "Trade Agreements and Regulatory Autonomy: The Effect on National Interests" in this volume (ch 15).

wide range of other accountability mechanisms, such as internal review, public transparency,[20] and democratic oversight.[21] These other accountability mechanisms also help control the exercise of regulatory power to differing degrees.[22]

While we do not directly address the methodology of non-judicial appellate bodies, some of our analysis readily translates across to supervision of regulatory decisions by tribunals. We recognise that such bodies are a key component of New Zealand's regulatory structure.[23] In many respects, tribunals mimic the formal, external, and legalised review of court-based supervision. In other respects, tribunals *may* bring some different character to the supervision task, through things like expertise, specialisation, and tailored procedural rules. These different characteristics may ameliorate (or, indeed, exacerbate) some of the tensions in the performance–supervision dynamic. However, the different nature of tribunals make it practically difficult to engage in a comprehensive study of their supervision methodologies. Instead, we leave review by tribunals to be addressed by way of extrapolation, based on the (varying) extent of their analogy with independent review undertaken by the courts.

8.2.4 *How: how is supervision conducted?*

(a) Introduction

In this context, when we refer to *supervision* of a regulatory decision, we are referring to the review by an external body after such a decision has been

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20 House of Lords Select Committee on the Constitution *The Regulatory State: Ensuring its Accountability* (HL Paper 68–I, 2004) at 19-27.

21 See Dawn Oliver "Regulation, Democracy and Democratic Oversight" in Dawn Oliver, Tony Prosser and Richard Rawlings (eds) *The Regulatory State: Constitutional Implications* (Oxford University Press, New York, 2010) at 243. Oliver suggests that democratic oversight includes accountability to ministers or Parliament (representative democratic oversight), shareholders or workers (producer democracy) and consumers (consumer democracy).

22 For a helpful analysis of the efficacy of some of the other control mechanisms, see House of Lords Select Committee on the Constitution *The Regulatory State: Ensuring its Accountability* (HL Paper 68–I, 2004) at 19-27. In the New Zealand context, see the non-exhaustive list offered in David Goddard QC "Public Law and Regulation" in New Zealand Law Society Intensive *Administrative Law – the public law scene in 2011* (New Zealand Law Society, Wellington, 2011) at 113 (including the Official Information Act 1982; the Ombudsmen Act 1975; the Public Audit Act 2001; review of certain delegated legislation by the Regulations Review Committee and; reporting obligations to Ministers, Parliament or both).

23 See, for example, the Immigration and Protection Tribunal under the Immigration Act 2009, the Gambling Commission under the Gambling Act 2003 and Taxation Review Authority under the Taxation Review Authorities Act 1994.

made. As we noted earlier, *appeal* and *judicial review* are two of the main (external) modes of supervision of regulatory decisions.[24]

We consider it is desirable to separate out the *development* and *implementation* of a regulatory rule and *supervision* of the implementation of that rule (or, as Cane describes it, *adjudication* on disputes arising from implementation).[25] This distinction is founded in the separation of powers. It is based on the idea that the decision-maker implementing the rule (or, in some cases, promulgating the rule) on the one hand, and the body charged with adjudicating that implementation on the other, represent autonomous centres of power with different values.[26] The case for a division between implementation and supervision rests on a constructive tension between these different values. The emphasis of a person charged with implementing a rule or regulation is to give effect to its purpose. The emphasis is on the social objective of the regulation. In contrast, the emphasis of the supervisor is on the legality of the regulation, the process by which it is developed and the protection of individual rights.[27] Similarly, those charged with developing rules and those charged with supervising their promulgation come at those tasks with different values.

A central concern of administrative law always has been, and remains, how to guard against the risk that those supervising an activity will become too involved in that activity, as is punctuated in the opening quote to this chapter.[28] In designing a regulatory framework, the aim is to provide for supervision that does not break the tension between supervision and performance. The nature of both appeal and judicial review vary, as we explore in more detail shortly. Both seek to respect, in different ways, the values underlying the performance-supervision dynamic, particularly in the ways they seek to respect (or not) the judgement of the primary decision-maker on the merits of the regulatory decisions under review.

The statutory framework for appeals is a first attempt, by the legislature, to provide a working balance between supervision and performance for

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24 For a discussion of the appeal and review framework in the United Kingdom, see Tony Prosser "Regulations, Markets, and Legitimacy" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6th ed, Oxford University Press, New York, 2007) 339; and House of Lords Select Committee on the Constitution *The Regulatory State: Ensuring its Accountability* (HL Paper 68–I, 2004) at 19–25.

25 Peter Cane *Administrative Tribunals and Adjudication* (Hart Publishing, Oxford, 2009) at 142.

26 Peter Cane *Administrative Tribunals and Adjudication* (Hart Publishing, Oxford, 2009) at 142.

27 Peter Cane *Administrative Tribunals and Adjudication* (Hart Publishing, Oxford, 2009) at 15.

28 See Alec Mladenovic "Network Industry Case Studies: Electricity and Telecommunications" in this volume (ch 13).

particular contexts. This is augmented by the courts, as they develop principles to regulate the judicial method for appeals.[29]

In judicial review, the development of doctrine regulating the judicial method of the supervising court remains the task of the courts themselves, the court's decision shaped by the interaction of doctrine with the legislative scheme and context.[30] Judicial review therefore involves two different discretions: doctrine is intended to "structure judicial discretionary control of exercises of administrative discretionary power".[31] Judicial review doctrine may be seen as implicitly containing *standards of legality* (focused on the requirements a primary decision-maker must conform to) and *standards of review* (focused on the appropriate methodology to be applied by the reviewing court).[32] The latter typically involves an assessment of the nature of the decision and the decision-maker, as a necessary first step toward determining the intrusiveness of review. The development of more intrusive forms of judicial review has been accompanied by an increasing focus on questions of the appropriate "weight", "latitude", "respect" or "deference" that should be accorded to decisions under review.[33]

We suggest that doctrinal developments can be mapped on a continuum between vigilance and restraint, recording the degree of intensity applied by the supervising courts to the regulatory decision under review.[34] This allows us to identify the extent to which existing judicial methods presently provide for, or do not provide for, review of the merits.

Our initial mapping of the contours of both appeal and review demonstrate that both mechanisms are pluralistic, with each representing variable forms of judicial methodology and intensity depending on the context and circumstances. Appeals are generally, but not always, more vigilant than judicial review. There is, however, some overlap and convergence between the two.

The relationship between the two modes of review is important. In the absence of statutory provision for appellate review, or of an attempt to restrict the scope of judicial review, common law judicial review is the default mode of supervision. Reciprocally, judicial review is discretionary and relief may be

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29 Sir Kenneth Keith "Appeals from Administrative Tribunals: The Existing Judicial Experience" (1969) 5 VUWLR 123 at 137.

30 Paul Craig "Fundamental Principles of Administrative Law" in David Feldman (ed) *English Public Law* (Oxford University Press, Oxford, 2004) 689 at 695.

31 Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ Law Review 423 at 478.

32 Tom Hickman *Public Law After the Human Rights Act* (Hart Publishing, Oxford, 2010) at 99–111.

33 Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ Law Review 423.

34 See Michael Fordham *Judicial Review Handbook* (4th ed, Hart Publishing, Oxford, 2004) at 270; Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Review 393 at 412.

declined where the court considers an appeal the more appropriate remedy. Making provision for an appeal on the merits exposes the regulator to a degree of supervision higher than that involved in other forms of review. In many instances such a commitment is desirable. But any decision to opt for an appeal on the merits should be the outcome of a considered assessment that starts with the nature of the decision under review and considers the form of review appropriate for it.

The present proposal for an appeal on the merits as part of the Regulatory Standards Bill appears to contemplate a strong presumption in favour of one particular type of appeal, namely an "appeal on the merits".[35] This is not a term of art,[36] and exactly what is intended is unclear, as we explore later. Finally, judges and commentators, rightly or wrongly, view proportionality as an intrusive form of review, going to the merits of a decision.[37] While it is not equivalent to merits review, it may be more intrusive than more longstanding doctrines of judicial review.[38]

(b) Appellate review

Appellate review is often treated, erroneously, as representing a singular form of judicial supervision.[39] The reality of appellate review, however, is that it involves variable intensity of review. As Sir Kenneth Keith said over forty years ago, appellate review amounts to a continuum of different methodologies: from "a limited 'wrong principle' conception" at one end, to full review at "the other extreme" where the court "will substitute its own discretion".[40]

The degree of intensity bought to the supervision task depends predominantly on how Parliament has conferred jurisdiction to review on the relevant court, particularly the identification of the type or form of appellate review in the statute and other procedural and evidential rules which influence the reviewing task.

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35 Regulatory Standards Bill 2011 (277-1), cl 7(1)(g)(i) .

36 The taskforce's usage of the term does not provide a clear meaning when assessed against the varying typologies of appeal contained in Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 213; and the following sources: Sir Kenneth Keith "Appeals from Administrative Tribunals: The Existing Judicial Experience" (1969) 5 VUWLR 123; Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 Edition and Amendments* (Ministry of Justice 2001); GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010).

37 Jeff King "Proportionality, Deference, Wednesbury: Taking up Michael Taggart's Challenge: Proportionality a Halfway House" [2010] NZ Law Review 229.

38 See the discussion in the last paragraph of Part 8.2.4(c) of this paper.

39 See Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 824; and GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010).

40 Sir Kenneth Keith "Appeals from Administrative Tribunals: The Existing Judicial Experience" (1969) 5 VUWLR 123 at 137.

The type or form of review varies and mandates judicial intervention in different circumstances. The different types or forms of appeal have been described in different ways.[41]

At one extreme is a *de novo appeal or hearing*,[42] sometimes described as merits review.[43] In de novo appeals, the appellate body stands in the shoes of the primary decision-maker and hears the matter afresh, which may include the provision of fresh evidence.[44] This is the most vigilant form of judicial supervision, generally allowing the supervising court to form its own view on the law, fact and policy engaged in the regulatory decision. This form of appeal can be seen in, for example, some resource management appeals,[45] appeals relating to the regulation of charities,[46] and some transport licensing appeals.[47]

At the other extreme is a grouping of appeals with a more restricted mandate. *Appeals of questions of law* or *appeal by way of case stated* only

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41 Compare GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [4.01] ("de novo appeals", "general appeals", "appeals as from discretion", and "appeals on questions of law"); Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice 2001) at [13.4.2] ("pure appeals", "appeals by way of rehearing", "hearings de novo", and "appeal by way of case stated"); and Sir Kenneth Keith "Appeals from Administrative Tribunals: The Existing Judicial Experience" (1969) 5 VUWLR 123 at 126 ("general", "law only", "as from discretion"; "de novo", "rehearing", "on the record").

42 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice, 2001) at [13.4.2].

43 Elisabeth Fisher "Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Courts and Tribunals" in Linda Pearson, Carlow Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, Oxford, 2008) at 322; and Robyn Creyke "Administrative Tribunals" in Matthew Groves and HP Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, Cambridge, 2007) 77 at 83.

44 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice 2001) at [13.4.2]. There are, though, differences in the legislative schemes providing for such appeals; therefore, even at this extreme, there may be subtle variations in the way merits review operate: Elisabeth Fisher "Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Courts and Tribunals" in Linda Pearson, Carlow Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, Oxford, 2008) at 322.

45 Resource Management Act 1991, s 290 (appeals from consent authorities to Environment Court). See *Ross v Number Two Town and Country Planning Appeal Board* [1976] 2 NZLR 206 (CA) (appeals from predecessor Town and Country Planning Appeal Board); and *[Environment Court] Practice Note* [2006] NZRMA 357, at [4.1.1].

46 Charities Act 2005, ss 59 and 61. See *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC).

47 Land Transport Act 1998, ss 106 and 111. See *Thet v New Zealand Transport Agency* DC Auckland CIV-2009-004-664, 22 September 2009.

allow the supervising court to intervene to correct an error of law or to determine a legal question.[48] Sometimes, though, an unreasonable factual error may amount to an error of law.[49] It is relatively common for appeals from inferior courts and tribunals to the superior courts to be restricted to questions of law.[50] Where an appeal is restricted to points of law, it has been recognised that the approach adopted in appellate review tends to mimic the approach adopted in judicial review. As Sir Kenneth Keith notes, "the distinction between appeals, especially appeals on law alone, on the one hand, and judicial review on the other can and often does disappear".[51] A vivid example of this fusion is Wild J's decision in *Wolf v Minister of Immigration*, where the Judge resolved the case according to judicial review principles, even though the matter came before the High Court as a statutory appeal.[52] *Pure appeals* or *appeal stricto sensu* are not restricted to errors of law. An appellate body can overturn the judgment or factual finding of the primary decision-maker, but only based on the evidence that was actually provided in the first instance – no new evidence is permitted.[53] The restrictive nature of the permissible evidence on this type of appeal means it is now unfashionable.[54]

In between the extremes of an appeal de novo and an appeal stricto sensu lie appeals by way of re-hearing. These appeals are usually heard on the record of evidence before the primary decision-maker.[55] However, there is often an

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48 *Schier v Removal Review Authority* [1999] 1 NZLR 703 (CA); *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340; and *Harris Simon & Co Ltd v Manchester City Council* [1975] 1 All ER 412 (QB).

49 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL); and *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721.

50 See, for example, Resource Management Act 1991, s 299 (appeal from Environment Court to High Court); Copyright Act 1994, s 224 (appeal from Copyright Tribunal to High Court); Legal Services Act 2000, s 59 (appeal from Legal Aid Review Panel to High Court); Immigration Act 2009, s 245 (appeal from Immigration and Protection Tribunal to High Court); Commerce Act 1986, s 91(1B) (appeal from some Commerce Commission determinations to the High Court).

51 Sir Kenneth Keith "Appeals from Administrative Tribunals: The Existing Judicial Experience" (1969) 5 VUWLR 123 at 159; see also *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [2].

52 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC). An appeal from the Deportation Review Tribunal to the High Court under s 117 of the Immigration Act 1987 was restricted to points of law.

53 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice, 2001) at [13.4.2].

54 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice, 2001) at [13.4.2].

55 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice 2001) at [13.4.2]. Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR20.16.01].

ability to re-hear or receive more evidence.[56] The appellate court may also reach its own independent findings on the evidence (but there are some presumptions about the circumstances in which the appellate court can differ from the decision-maker under review).[57] The Legislation Advisory Committee regards an appeal by way of rehearing as most appropriate for most circumstances:[58]

> [A]n appeal by way of re-hearing is] is more expeditious than a hearing de novo because of its focus on specific alleged errors, but not as restrictive as an appeal stricto sensu. Indeed, an appeal should focus on specific alleged errors. In general, there is no need to provide an opportunity to re-litigate the whole matter, as in a hearing de novo, unless there is good reason not to presume that the first instance decision-maker correctly ascertained the facts. The added cost of a complete rehearing generally counts against this procedure. An appeal should not be by way of case stated unless there is some reason why this option is preferable to an ordinary appeal limited to questions of law.

Provision for such appeals is therefore relatively common. Civil procedure rules adopt appeal by way of rehearing as the default approach, in the absence of specific legislation mandating otherwise.[59] This mode of appeal is also adopted in relation to appeals from some professional bodies.[60]

The supervisory methodology and intensity of review applied is determined by more than the form or type of the appeal right. There may also be procedural restrictions which affect the material an appeal court can consider (some of which have been alluded to above). In some circumstances, the legislation may present barriers to considering certain matters afresh or require the appellate body to have particular regard to the decision or findings

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56 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice 2001) at [13.4.2]. Also see *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1991] 2 NZLR 557 (CA).

57 Andrew Beck and others *McGechan on Procedure* (online loose-leaf ed, Brookers) at [HR20.18.01]. See, for example, *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 (SC); *Austin, Nichols & Co v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141; *Tang Ming Hardware Co Ltd v Li* (2009) 19 PRNZ 683 (HC); *Wildbore v Accident Compensation Corporation* [2009] NZCA 34, (2009) 19 PRNZ 239; and *Kacem v Bashir* [2010] NZSC 112, [2010] NZFLR 884.

58 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice, 2001) at [13.4.2].

59 See, for example, High Court Rules, r 20.18 (general default provision for appeal by way of rehearing for appeals to High Court); District Court Rules 2009, r 14.17 (general default provision for appeal by way of rehearing for appeals to District Court).

60 See, for example, Medical Practitioners Act 1968, s 53 (appeal from Medical Council to High Court); Health Practitioners Competence Assurance Act 2003, s 109 (appeal to High Court from Health Practitioners Disciplinary Tribunal); and Lawyers and Conveyancers Act 2006, s 253 (appeal to High Court from Lawyers and Conveyances Disciplinary Tribunal).

of the primary decision-maker.[61] These procedural restrictions also influence the reviewing court's disposition to interfere with or second-guess the decision of the primary decision-maker. In other words, these restrictions affect the intensity of review on appeal.

While the types or forms of appeals outlined above represent the commonly referred to approaches, these categories are not necessarily exhaustive or definitive. As Beck notes, "the courts have not always used the terminology in exactly the same way" and the question of "what the [appeal] court is actually expected to do" ultimately depends on the interpretation of the statute conferring the right of appeal.[62] This is consistent with Sir Kenneth Keith's conclusion that there is "no single precise answer to the extent of appellate review". He also suggests the statutory formula may not be definitive and that "more precise articulation" about the appropriate scope of review will normally need to come from the courts.[63]

In summary, the types or forms of appeals outlined above, and the procedural restrictions discussed, demonstrate that judicial supervision by way of appeal varies considerably, with more vigilant and more restrained approaches evident. In some cases, there may be a degree of convergence or analogy with judicial review methodology. However, many (but not all) of the types or forms of review generally contemplate more intensive review than is usually available in judicial review. This is particularly so for those appeals where the appeal provision includes a legislative mandate for the appellate court to consider matters of fact and judgment afresh.

(c) Judicial review

The secondary or supervisory nature of judicial review is emphasised frequently in discussion of the proper approach to review.[64] Long-standing mantras urge the reviewing court not to usurp the role of the public body or official under review:[65]

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

The courts are warned against the "forbidden substitutionary approach", namely the idea that the courts "will not intervene as if matter for the public

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61 See for example s 290A of the Resource Management Act 1991.

62 Andrew Beck *Principles of Civil Procedure* (2nd ed, Brookers, Wellington, 2001) at [266].

63 Sir Kenneth Keith "Appeals from Administrative Tribunals: The Existing Judicial Experience" (1969) 5 VUWLR 123 at 151.

64 Some of the material from this part is drawn from Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Review 393.

65 *Chief Constable of the North Wales Police v Evans (*1982] 3 All ER 141 (HL).

body's judgment were for the Court's judgment".[66] Indeed, the powers of the courts on judicial review are often labelled its "supervisory jurisdiction".[67] One of the ways that the forbidden substitutionary approach is expressed is to say that judicial review "is not concerned with the merits of a decision".[68] Judicial review is often contrasted with statutory appellate review (although the contradistinction is generally overstated):[69]

> The courts proclaim an essential difference between appeal and review. Review is concerned with the legality of the decision, whether it was reached "in accordance with law, fairly and reasonably". A reviewing court must address the process and procedures of decision-making and ask whether the decision should be allowed to stand. Appeal, in contrast, entails adjudication on the merits and may involve the court substituting its own decision for that of the decision-maker.

While the various guidance promoting judicial restraint is a useful starting point or presumption, it is clear that the approach to review is nowadays more diverse. The extent to which the courts engage in a review of the merits varies according to context. The approach to review no longer depends merely on the classification of the nature of the alleged error or the mechanism selected to attack it.

The nature of the alleged error is no longer seen to be as determinative as it once was, as the difficulties of classification are recognised. As Professor Taggart said, "many of the dichotomies upon which administrative law has rested – appeal/review, merits/legality, process/substance, discretion/law, law/policy, and fact/law – are no longer seen as giving as much guidance as they once did".[70] At the front-line, the recent edition of *Judge Over Your Shoulder* acknowledges that, on a practical level, it is sometimes "difficult to completely sever" process from the merits.[71] Our courts have also been quite eager to uphold the principle of contextualism – or, as it has been famously

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66 Michael Fordham *Judicial Review Handbook* (4th ed, Hart Publishing, Oxford, 2004) at [15.1].

67 Peter Cane *Administrative Law* (4th ed, Oxford University Press, New York, 2004) at 1.

68 Crown Law Office *Judge Over Your Shoulder* (2005) at [11].

69 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brooker, Wellington, 2007) at 821. See also GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [4.01].

70 Michael Taggart "Administrative Law" [2006] NZ Law Review 75 at 83. See also the observation of Elias CJ that "[o]ld boundaries, always porous", between law and policy, fact and law, process and substance, private and public, legislative and administrative "with which [the courts] have tried to provide bright lines and rules", need to be reconsidered or re-justified: Sian Elias "Righting Administrative Law" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) at 71.

71 Crown Law Office *Judge Over Your Shoulder* (2005) at [12].

put, "in law, context is everything".[72] The strong emphasis on context means it is difficult to articulate a generalised approach applicable throughout the supervisory jurisdiction.[73] Modern judicial review involves a large dose of (overt and covert) variability of judicial method, driven by contextualism. While our senior judges seem reluctant to explicitly embrace the concepts of variable intensity or deference, variability is inherent is much of the courts' supervisory method.[74]

The orthodox grounds of review – Lord Cooke's "fairly, reasonably and in accordance with the law"[75] or Lord Diplock's "illegality, irrationality, and procedural impropriety"[76] – present a picture of prescribed degrees of intensity. Under the illegality or in accordance with law ground, the courts adopt an extremely vigilant approach, where the supervising court is charged with determining the proper interpretation of law or the determination of the elements required by the legislation or legal context.[77] Similarly, under the procedural impropriety or fairness ground, the courts proclaim their ability to intervene if there has been any defect in the process. In contrast, judicial deference or restraint is generally applied to the merits, whether that be ordinary fact-finding, judgment, discretion, weight, or balancing, under the well-known *Wednesbury* principle.[78] But, arguably, even this categorical approach to review exhibits elements of variability. In many cases, the tripartite grounds overlap, merge, and tend to break-down.[79] The classification or framing of the error as one of law, process or merits therefore becomes crucial in the determination of the approach adopted by the reviewing court.

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72 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28]. For a discussion of contextualism in New Zealand judicial review, see Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ Law Review 423 at 450 and Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Review 393.

73 Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ Law Review 423 at 450. For the tradition of stating general principles for judicial review, Peter Cane *Administrative Law* (4th ed, Oxford University Press, New York, 2004).

74 Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Review 393 at 411-429.

75 Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1 at 5.

76 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 950.

77 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA); and *Peters v Davison* [1999] 2 NZLR 164 (CA).

78 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (EWCA); *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA).

79 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 552 (CA).

Such classification is far from straightforward. It involves a degree of judicial judgment and appears to vary according to the context.[80]

Our courts have also overtly departed from these categorical or doctrinal grounds in particular cases or contexts.[81] This is most pronounced in two areas. First, the courts have applied doctrines which enable greater scrutiny of the merits of a decision. Some judges have promoted more vigilant formulations of the unreasonableness ground of review.[82] There is now some acceptance that less deferential forms of the reasonableness ground of review may be appropriate.[83] Others have dabbled with other substantive sub-grounds that involve more intense scrutiny (albeit with differing degrees of acceptance).[84] Substantive legitimate expectation and proportionality are the two sub-grounds which have assumed general legitimacy in some particular contexts. Notably, proportionality is entrenched as the most appropriate methodology for review in cases under the New Zealand Bill of Rights Act

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80 Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Review 393 at 416.

81 Dean Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ Law Review 393 at 420–426.

82 Notable formulations include: (a) a simple but universal form of unreasonableness (Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 403–405 per Thomas J); (b) an intermediate category of simple unreasonableness (*Wolf v Minister of Immigration* [2004] NZAR 414 (HC) at [33]); (c) a number of categories of unreasonableness or substantive review, each with varying intensity (for example, *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 (HC); *Mihos v Attorney-General* [2008] NZAR 177 (HC)); (d) "hard look" or more intense sliding scale of review (see, for example, *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 66; *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC); *Huang v Minister of Immigration; alt cit Qiong v Minister of Immigration* [2007] NZAR 163 (HC); *Wright v Attorney-General* [2006] NZAR 66 (HC); and *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC)).

83 Dean Knight "A Murky Methodology: Standards of Review in Administrative Law" [2008] NZJPIL 180 at 188-189; Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ Law Review 423 at 446–450.

84 Some examples include: (a) substantive legitimate expectation (*R v North East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850 (EWCA); and *Challis v Destination Malborough Trust Board Inc* [2003] 2 NZLR 107 (HC)); (b) inconsistent treatment (*Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA); *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC); and *Murphy v Rodney District Council* [2004] 3 NZLR 421 (HC)); (c) disproportionality (*R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1; *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA); and *Conley v Hamilton City Council* [2007] NZCA 543, [2008] 1 NZLR 789); (d) substantive fairness (*Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA); *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747 (HC)).

1990,[85] although its application to the balance of administrative law cases has so far been resisted (and continues to be debated).[86]

Secondly, the courts have been willing to restrict or circumscribe the traditional grounds of review in particular circumstances, because of concerns about the suitability of particular questions to judicial adjudication. Non-justiciability might be absolute, with judicial review being entirely unavailable.[87] Review may still be permitted, but on more limited grounds than usual.[88] This form of limited justiciability is commonly seen in supervision of quasi-public bodies like SOEs,[89] review of commercial decisions of public bodies,[90] and other instances of public law adjudication in the commercial sphere.[91]

Given the loose analogy drawn by some between an appeal on the merits and proportionality review, the deployment of proportionality is of some interest in our project.[92] While we recognise that proportionality has been promoted as a doctrine which enables greater consideration of the merits, especially in human rights cases, we are sceptical about the extent to which that claim can be generalised. Proportionality is a methodology which structures the assessment of the necessity, suitability, and appropriateness of

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85 Regulatory decisions will generally be reviewable under the New Zealand Bill of Rights Act 1990, either due to the public character of the regulator (s 3(a)) or by virtue of the regulation being a public function (s 3(b)).

86 Michael Taggart "Proportionality, Deference, Wednesbury" [2008] NZ Law Review 423 at 448–449. See generally the articles written in response in the 2010 New Zealand Law Review: for example Jeff King "Proportionality, Deference, Wednesbury: Taking up Michael Taggart's Challenge" [2010] NZ Law Review 229–455.

87 See, for example, *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [26]-[28]; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA); *Milroy v Attorney-General* [2005] NZAR 562; *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 (CA). Professor Harris describes this as "primary non-justiciability": Bruce V Harris "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 63 CLJ 631.

88 Harris describes this as "secondary non-justiciability": Bruce V Harris "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 63 CLJ 631.

89 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

90 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [88]; *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, [2009] 3 NZLR 713 at [103]. Compare *Air New Zealand Ltd v Nelson Airport Ltd* HC Nelson CIV-2007-442-584, 16 June 2008 per Wild J; and *Air New Zealand Ltd v Nelson Airport Ltd* HC Nelson CIV-2007-442-584, 27 November 2008 per Miller J.

91 *Willis Trust Co Ltd v Green* HC Auckland CIV-2006-404-809, 25 May 2006; *Tayler v LaHatte* HC Auckland, CIV-2007-404-6843, 24 June 2008; John Ren "Judicial Review of Construction Contract Adjudicators" [2005] NZLJ 461.

92 For an explicit call for proportionality to be adopted when supervising commercial regulation, see Jaime Arancibia *Judicial Review of Commercial Regulation* (Oxford University Press, New York, 2011).

an administrative measure.[93] As such, unlike a claim that a decision will be subject to appeal on the merits, to say that a decision will be subject to proportionality review does not directly address the intrusiveness of judicial scrutiny.[94] That said, the distinction between *proportionality* and *appeal on the merits* should not be overstated, in terms of the standard or intensity of review they involve. There *is* a sense in which an invitation to the courts to engage in a proportionality analysis does invite the courts to engage with the merits of a decision, more so than with more traditional administrative law methodologies employed to examine the substance of a decision.[95] But any merits review undertaken under the guise of proportionality usually relates only to one *aspect* of the decision (namely whether the decision infringes the relevant right or rights disproportionately)[96] and is unlikely to be equivalent to the *full* merits review of a decision.

(d) Conclusion

The two formal judicial mechanisms for supervising regulatory decisions – appeals and judicial review – are therefore both variable in nature. The degree of intensity brought to the task of supervision differs within each mode of review and, in some cases, overlaps. It is therefore overly simplistic to approach the task of designing supervisory frameworks for regulatory decisions on the basis of a choice between two binary mechanisms: review vs appeal. An approach more alive to the potential impact of different forms of appellate review (or their absence) on the supervisory relationship is required.

8.3 The Regulatory Standards Bill: an attempt to universalise appeal on the merits

On the key issues of supervisory approach that fall within the scope of this paper, the Bill currently before the New Zealand Parliament looms large.[97] The

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93 *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (PC) and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

94 The variability of the intensity of proportionality review is acknowledged by one of its key proponents: Paul Craig "Proportionality, Rationality and Review" [2010] NZ Law Review 265 at 289.

95 For example, Arancibia assumes that proportionality amounts to an "intensive mode of judicial review": Jaime Arancibia *Judicial Review of Commercial Regulation* (Oxford University Press, New York, 2011) at 10.

96 Tom Hickman *Public Law After the Human Rights Act* (Hart Publishing, Oxford, 2010) at 176.

97 Regulatory Standards Bill 2011 (277-1). The Bill was introduced in the House on 15 March 2011. The current version of the Bill had its origins in a Member's Bill, ultimately rejected by the Commerce Committee in 2008: Regulatory Responsibility Bill 2006 (71-1). Following the

decision made by those promoting the Bill to "incentivise" legislative provision for appeals on the merits by categorising provision for such appeals as a "principle of responsible regulation", analogous to a right under the New Zealand Bill of Rights, squarely engages with the issues central to our project.[98] The Bill is promoted as an effort to "to improve the quality of regulation in New Zealand".[99] At the centre of the Bill lie a number of "Principles of Responsible Regulation". The central motivation for the Bill was to incentivise "upstream" awareness of the nominated principles by those drafting legislation and regulations.[100] The mechanisms intended to achieve this end were a requirement that those involved in the creation of legislation and regulation certify its compatibility with the principles, and the provision for judicial declarations of incompatibility with the principles. These mechanisms mirror the wording of those provided for in, or developed under, the New Zealand Bill of Rights Act 1990.[101]

The Bill mandates a right of appeal on the merits to an independent body from all decisions affecting a "freedom, liberty or right", where these interests

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2008 election, the governing National and ACT agreed to establish a task force "to carry forward work on the Regulatory Responsibility Bill": "National-ACT Confidence and Supply Agreement" (2008) available at www.parliament.nz/NR/rdonlyres/0300A59A-A076-470C-B347-C31C96890794/94915/NationalAct_Agreement20094.pdf (last accessed 8 August 2011). The taskforce produced a draft bill in September 2009: Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009). The Bill as introduced into Parliament is almost identical to the draft bill prepared by the taskforce. For accounts situating the Bill in a broader historical and political context see Jane Kelsey '"Regulatory Responsibility': Embedded Neoliberalism and its Contradictions" (2010) 6 *Policy Quarterly* 36 and Jack Hodder SC "Public Law, Property Rights and Principles for Legislative Quality" in New Zealand Law Society *Administrative Law – The Public Law Scene in 2011* (New Zealand Law Society, Wellington, 2011).

98 For a more detailed discussion see Petra Butler "Rights and Regulation" in this volume (ch 9).

99 Regulatory Standards Bill 2011 (277-1) (explanatory note).

100 See Jack Hodder SC "Public Law, Property Rights and Principles for Legislative Equality" in New Zealand Law Society *Administrative Law – the public law scene in 2011* (New Zealand Law Society, Wellington, 2011); The Treasury "*Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act* (2011).

101 First, the Regulatory Standards Bill 2011 (277-1) contains various requirements accompanying the legislative process for the vetting and certification of compatibility with the principles (cls 8–10; compare New Zealand Bill of Rights Act 1990, s 7). Secondly, the courts are directed, wherever possible, to interpret an enactment compatibly with the principles (cl 11; compare New Zealand Bill of Rights Act 1990, s 6), and where not possible a declaration of incompatibility is to be granted (cls 12 and 13). Thirdly, as part of this process, the courts are instructed to assess whether non-compliance with the principles of responsible regulation, such as the lack of provision for an appeal on the merits, is demonstrably justified in a free and democratic society (cl 7(2); compare New Zealand Bill of Rights Act 1990, s 5). One criticism of the Bill has been that "If rights in the RRB are of the sort that should be in the New Zealand Bill of Rights Act, then that is where they should be." Paul Rishworth, "A Second Bill of Rights for New Zealand?" (2010) 6:2 *Policy Quarterly* 3 at 6.

are defined in an expansive fashion.[102] The relevant "principles of responsible regulation" are stated as follows:

> **7 Principles**
> (1) The principles of responsible regulation are that, except as provided in subsection (2), legislation should –…
> (g) if the legislation authorises a Minister, a public entity, or a public official to make decisions that may adversely affect any liberty, freedom, or right of the kind referred to in paragraph (b):
> (i) Provide a right of appeal on the merits against those decisions to a court or other independent body; and
> (ii) State appropriate criteria for making those decisions. …
> (2) Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.

The kind of "freedom, liberty or right" that, if adversely affected, triggers the strong presumption of an appeal on the merits is "a person's liberty, personal security, freedom of choice or action, or rights to own, use and dispose of property".[103] With the relevant interests so broadly and vaguely defined, there is a strong presumption that a wide swathe of regulatory action will be subject to an appeal on the merits by reason of adversely affecting a relevant interest.

All the principles, including the provision for appeal on the merits, are subject to a limitation requirement, substantially similar to that contained in s 5 of the New Zealand Bill of Rights Act.[104] The onus is placed on the government to justify, to the Parliament and the courts, a failure to provide for an appeal on the merits.[105]

It remains uncertain whether this proposed regime will become law.[106] The Bill has been subjected to stinging criticism from experts and officials,[107] but at

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102 See Petra Butler "Rights and Regulation" in this volume (ch 9).

103 Regulatory Standards Bill 2011 (277-1), cl 7(1)(b).

104 Regulatory Standards Bill 2011 (277-1). Clause 7(2) of the Bill reads: "Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society."

105 Regulatory Standards Bill 2011 (277-1), cls 8–10. In terms of the justification to Parliament, a certification requirement attaches to both the responsible Minister and "the chief executive of the public entity that will be responsible for administering the resulting act", at least in respect of some of the principles. Derek Gill has raised in discussion the ways in which this will complicate relations between the responsible Minister and the public servants who serve under her or him.

106 At the time of writing, the Bill had passed its first reading and been referred to Select Committee.

107 The Treasury *Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act* (2011). Available at www.treasury.govt.nz /publications/informationreleases/ris/pdfs/ris-tsy-rbr-mar11.pdf (last accessed 8 August 2011); "Special Issue: The Regulatory Responsibility Bill" (2010) 6:2 *Policy Quarterly*; with

the time of writing continues to advance through the legislative process. We remain sceptical about its utility. Our focus in this paper is on its blunt approach to supervision, namely, the favouring of appeal on the merits as the ideal form of supervision. Our concerns are:

- that the problem the Bill is intended to address is not clearly identified, lending a lack of clarity to it;
- that it is informed by an assumption that a simple intervention will result in a simple regulatory system;
- that it further assumes that flexible guidelines can readily be translated into a legislative requirement;
- that there is a general failure to speak to the costs of such a proposal; and
- that it shows little awareness of how it might juridify policy.

A fundamental problem with the Bill is that a diagnosis of the cause of poor quality regulation, the necessary first step in crafting any response, is undeveloped. As Treasury's Regulatory Impact Statement noted, the Regulatory Standards Bill (and its predecessor Taskforce report) fails to meet this requirement:[108]

> The case for new requirements rests in part on a conclusion that changes to existing arrangements won't substantially improve legislative quality. The Taskforce indicated it was satisfied on this, though it did not really explain why …
>
> One criticism of the Taskforce's report is that it fails to provide a sound, evidence based explanation of what causes bad law, to justify its recommendations. To be fair to the Taskforce it was not asked to do so …

We agree with the view, implicit in Treasury's Regulatory Impact Statement, that the Regulatory Standards Bill does not live up to its own ideals for

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contributions by Paul Rishworth, Richard Ekins, George Tanner, Jane Kelsey and Geoff Bertram, all critical of the Bill. Contributions supportive of the Bill were made by Tim Smith, David Caygill and Graham Scott, all of whom had been involved in the Taskforce's work. There is also an exchange in the 2010 volume of the *New Zealand Law Journal* between Richard Ekins (critical) and Bryce Wilkinson and Graham Scott (supportive). See Richard Ekins "Regulatory Responsibility?" [2010] NZLJ 25; Graham Scott and Bryce Wilkinson "Regulatory Responsibility: A Response" [2010] NZLJ 47; Richard Ekins "Reckless Law-making" [2010] NZLJ 127. See also Chye-Ching Huang, "Regulatory Responsibility and the Law" [2010] NZLJ 91 (critical) and Richard Ekins and Chye-Ching Huang "In Search of Better Law-Making: Why the Regulatory Responsibility Bill won't deliver what it promises" (2011) *Maxim Institute Guest Paper*. Finally, see also the critical Law Commission submission on the Bill's predecessor: Law Commission "Submission to the Commerce Select Committee on the Regulatory Responsibility Bill 2006". The paper is also available online at: www.parliament.nz/NR/rdonlyres/BCD83211-13CC-4BAF-BDBF-AF33FAABB95E/63760/LawCommission3.pdf (last accessed 8 August 2011).

108 Treasury *Regulatory Impact Statement: Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act* (2011) www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-tsy-rbr-mar11.pdf (last accessed 8 August 2011) at [10].

subjecting regulatory interventions to a rigorous vetting process.[109] Gill rightly identifies the underlying problem with the Bill: "Without a clear exposition of the cause of poor quality regulation, it is difficult to prescribe an intervention or package of interventions that will be focussed on the source of the problem."[110]

The lack of problem diagnosis undermines the blanket endorsement of an appeal on the merits. Promoters of the Bill argue that the mechanisms it contains have the merit of simplicity.[111] We contend that the vagueness of key terms alone makes implementation of the Bill anything but simple. But even if it is conceded that mechanisms contained in the Bill are simple, the presentation of the simplicity point fails to adequately distinguish between a simple intervention and the simplicity of the system resulting from that intervention.

The Taskforce report suggests some latitude as to what provision for "appeal on the merits" requires. It states that "the principle does not specify the form of the appeal (that is, whether it is by way of rehearing, or de novo), or the burden to be overcome by the appellant".[112] As to what the term does specify, the intention appears to be that "appeal on the merits" demarcates a form of supervision which is both distinct from, and more intrusive than, judicial review.[113] The Taskforce said this principle is "currently recognised" in the Standing Orders for the Regulatory Review Committee, namely in SO310(2)(d) which states that one basis for the Committee drawing a regulation to the attention of the House is that it "unduly makes the rights or liberties of persons dependent on an administrative decision not subject to review on its merits by a judicial or other independent tribunal".[114] In its Regulatory Impact Statement on the Bill, however, Treasury voiced the concern that the Bill is based on "too strict a distillation of more flexible guidelines gathered from other sources".[115] We are similarly doubtful that the

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109 The point is well made that the Treasury Regulatory Impact Statement does not itself provide a "clear diagnosis" of the "disease": see Derek Gill "Regulatory Management in New Zealand: What, Why and How?" in this volume (ch 7). See also George Tanner "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts" (2010) 6:2 *Policy Quarterly* 21.

110 See Derek Gill's issues chapter in this volume: "Regulatory Management in New Zealand: What, Why and How?" (ch 7).

111 Jack Hodder SC "Public Law, Property Rights and Principles for Legislative Quality" in New Zealand Law Society *Administrative Law – The Public Law Scene 2011* (New Zealand Law Society, Wellington, 2011).

112 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.78].

113 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.77].

114 Standing Orders of the House of Representatives 2008, SO 310(2)(d).

115 Treasury *Regulatory Impact Statement: Regulating for better Legislation – What is the Potential of a Regulatory Responsibility Act* (2011).

principle guiding the Regulations Review Committee's review of subordinate legislation (a principle necessarily framed in contingent form by the adoption of the qualified "unduly") can effectively be transposed into a principle of general application to primary legislation whenever an ill-defined range of interests is adversely effected.

The proposal can be understood to build on reports by the Regulations Review Committee in which judicial review has been held to be an inadequate "appeal mechanism for an administrative decision", and regulations that rely on judicial review in the absence of fuller appeal rights criticised accordingly.[116] Insofar as the Taskforce was proceeding on the basis that concerns expressed by the Regulations Review Committee in particular cases should be translated into a general presumption that matters currently supervised by judicial review should be the subject of an "appeal on the merits", the point is seriously under argued. There is no mention of the fact that for a sub-set of cases with which the Taskforce is concerned, involving infringement of existing rights, judicial review is often at its most intrusive.[117]

An appeal by way of rehearing, or an appeal de novo, and judicial review, are alternative ways in which a person can seek to address a grievance, and careful consideration needs to be given to which is the more appropriate in a given context. More fundamentally, the issue of improving regulatory quality is arguably distinct from the issue of addressing a grievance.[118] Insofar as the Bill is centrally concerned with improving regulatory quality, it needs to engage with the prospect that strengthening grievance procedures may not be a particularly effective or efficient way to do so.[119]

We are aware that the Bill provides for an appeal on the merits to a court "or other independent body". This addition is a welcome broadening of the institutional possibilities beyond the courts. That said, we would expect some discussion of the thinking behind the phrase to accompany a proposal with such wide-ranging effects.[120] The Bill as a whole remains strongly "court-centric" in orientation. And whatever the institution, it is not apparent why an appeal on the merits should always, or even almost always, be appropriate.

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116 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (3rd ed, New Zealand Centre for Public Law, Wellington, 2009) at ch 8.

117 It is clearly relevant here that the rights in aid of which more vigilant judicial review is employed are a more constrained set than the expansive notion of liberties contained in clause 7(1)(b) of the Regulatory Standards Bill 2011 (277-1).

118 Peter Cane and Leighton McDonald *Principles of Administrative Law: Legal Regulation of Governance* (Melbourne, Oxford University Press, 2008) at ch 11.

119 Peter Cane and Leighton McDonald *Principles of Administrative Law: Legal Regulation of Governance* (Melbourne, Oxford University Press, 2008) at ch 11.

120 Regulatory Responsibility Taskforce *Report of the Regulatory Responsibility Taskforce* (Treasury, 2009) at [4.78] states that: "[i]t is not, however, necessary that the appellate body be a Court, and this may be inappropriate where particular expertise is necessary. In some cases, the creation of specialist appellate bodies, such as those under the Immigration Act 1987, may be appropriate".

The Taskforce does not discuss the costs involved in the wide-scale extension of provision for an appeal by way of rehearing or an appeal de novo. There are issues of duplication when decisions made prior to an appeal on the merits can be revisited. Secondly, the Bill carries the clear potential to upset the more context-sensitive juridical mechanisms currently available. Our analysis in this chapter has sought to emphasise the flexible and context-sensitive nature of the full suite of judicial methodologies available when supervising decisions. Against that backdrop, the move to strongly favour the more intrusive modes of appeal is simply too blunt and ignores the pluralism that has developed in this area. We do not discount the arguments made for simplicity of approach in the New Zealand context.[121] The many and varied legal contexts in which judicial supervision operates, however, lead us to a very different assessment from its promoters of the complications to which the Bill would give rise.[122]

Most fundamentally, the Bill contemplates a renegotiation of the administrative-judicial relationship that is underappreciated, and we will argue undesirable. It risks the juridification of the policy calculus, with the expertise and experience of specialist decision-makers being dominated by the more legalistic values associated with adjudication. In doing so it undermines the deliberate choice of the legislature to delegate, for a variety of reasons, that decision-making function to non-judicial bodies.

These comments all issue from our underlying concern with the Bill – that there has been no presentation of a diagnosis of the causes of poor quality regulation to justify the measures proposed. Any proposal for a regulatory intervention of far-reaching scope, such as that contained in the Bill, needs greater analysis and reflection about the underlying mischief it seeks to address and the costs involved. It needs to draw on a fuller accounting of the resources and cost involved, both directly, in making provision for appellate review, and indirectly, in the form of the demands and requirements on others generated by the demands of appellate bodies. Most importantly, in our view, any such proposal needs to accommodate the tension between supervision and performance. In other words, to what extent is it desirable that a set of values appropriate to appellate review should come to dominate the full range of regulatory decision-making subject to review?

While it is not the purpose of this project to directly and fully evaluate the virtues or otherwise of the appeal on the merits provision mandated in the

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121 Jack Hodder SC "Public Law, Property Rights and Principles for Legislative Quality" in New Zealand Law Society *Administrative Law – the public law scene in 2011* (New Zealand Law Society, Wellington, 2011).

122 For views that align with our own on the disruption the Bill's implementation would cause see, for example: George Tanner "How Does the Proposed Regulatory Responsibility Bill Measure Up Against the Principles? Changing the Role of Parliament and the Courts" (2010) 6:2 Policy Quarterly 21; and Treasury *Regulatory Impact Statement: Regulating for better Legislation – What is the Potential of a Regulatory Responsibility Act* (2011).

Regulatory Standards Bill, we have sought to locate this proposal within the broader context and to identify key concerns raised for the performance–supervision relationship in prioritising an appeal on the merits over other forms of accountability and control. Future work in the project examining the performance-supervision relationship more generally will also contribute to any evaluation of the desirability of reforms to the supervision of regulatory decisions.

8.4 Conclusion and issues for future examination

Ultimately, in this project we will investigate the context and variability inherent in the performance-supervision dynamic. The underlying factors that, in the regulatory context, influence that variability will be examined. In this chapter we have, on a provisional basis, identified a range of different modes and methodologies of supervision which provide for greater or lesser scrutiny of the merits of regulatory decisions. We have also identified the incongruity between the present pluralistic supervision processes and the favouring of one particular form of supervision – an appeal on merits – proposed in the Regulatory Standards Bill.

In the future stages of this project, we will undertake a principled analysis of the factors underlying these variable approaches. The Legislation Advisory Committee guidelines identify relevant factors in the context of appeals, but consistent with the guidelines' intended use, do not develop them in much detail. A principled analysis of variability of review involves a critical examination of the factors relied on to justify supervisory restraint (such as relative expertise, administrative efficiency, time and cost, the need for finality, and the dangers of over-legalisation). The arguments advanced in favour of more vigilant supervision (such as the potential for "better" regulatory outcomes, increased trust and confidence in administration, and avoiding adverse economic costs) will also be assessed.

Our approach to these issues, working from scholarship and empirical research, is intended to frame the relevant considerations involved in determining the particular mode and methodology for supervision of regulatory decisions, rather than directing the appropriate form of review in particular circumstances. In this way, a scholarly lens can inform an evaluation of current calls to reform the mode and form of supervision of regulatory decisions.