POWERCO V COMMERCE COMMISSION: DEVELOPING TRENDS OF PROPORTIONALITY IN NEW ZEALAND ADMINISTRATIVE LAW

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This comment outlines a recent High Court decision that raised issues of fundamental importance to New Zealand administrative law, reviews the status of proportionality review in New Zealand, and canvasses some of the issues surrounding proportionality as a developing head of review. The comment contends that proportionality is a tool by which courts can ensure good executive decision-making. It promotes structure and transparency in review proceedings, serves to better protect human rights without compromising the constitutional or institutional balance between the courts and executive, and is arguably called for by the New Zealand Bill of Rights Act 1990. Whether it should sweep the judicial review field remains an open issue.

I INTRODUCTION

It may seem surprising but recent interlocutory applications by two gas distributors against the Commerce Commission concerning procedural matters raised issues of fundamental importance to New Zealand administrative law. In *Powerco v Commerce Commission*,[1] Wild J made important observations regarding proportionality review and the scope of judicial review. This paper outlines Wild J's comments, reviews the status of proportionality review in New Zealand, and canvasses some of the issues surrounding this developing head of review.

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1 *Powerco Ltd v Commerce Commission*; *Vector Ltd v Commerce Commission* (9 June 2006) HC WN CIV-2005-485-1066; CIV-2005-485-1220 Wild J [*Powerco*].

II POWERCO V COMMERCE COMMISSION

Powerco involved certain interlocutory applications made in the context of proceedings brought by Powerco and Vector for judicial review of decisions of the Commerce Commission and the Minister to impose price controls on the two companies pursuant to the Commerce Act 1986. In his judgment, Wild J took the opportunity to comment on the status of proportionality review, which was one of Vector's pleaded grounds of judicial review. He said that whether proportionality is a stand-alone head of review in New Zealand is an open issue, and chose not to offer a decided view on the matter. He did, nonetheless, counsel Vector's advisers to consider whether this head of review, which has grown out of European human rights law, could "sensibly have any application to control of gas distribution in New Zealand."[2] He offered three further observations regarding the bounds of review. First, the grounds of review in New Zealand remain the three orthodox heads: illegality, unreasonableness and procedural impropriety; secondly, the focus of review remains firmly on process rather than the correctness of the executive decision itself; and thirdly, unreasonableness has correctly moved on from the single *Wednesbury* standard to an intensity of review appropriate to the subject matter.

III *DISCUSSION*

A *Proportionality: Background and New Zealand Developments*

The concept of proportionality referred to in *Powerco* derives from the civil law jurisdictions of Europe: in Germany (*Verhältnismäßigkeit*) and France (*Le Principe de Proportionalité*), the principle has long been recognised. The doctrine is relevant under the European Convention on Human Rights to instances where states seek to limit rights. In deciding whether limits are legal, the European Court of Human Rights must balance the Convention right at stake against other countervailing interests such as national security, public health or morals. To do this, the European Court has applied a three-stage proportionality test:[3]

- necessity: the state's objective must be sufficiently important to justify limiting a fundamental right;
- suitability: the measures designed to meet the state's objective must be rationally connected to it; and
- proportionality: the means used to impair the right must be no more than is necessary to accomplish the objective.

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2 *Powerco*, above n 1, para 15 Wild J.

3 See *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (PC) Lord Clyde, quoted by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, para 27 (HL) [*Daly*].

This test becomes relevant in judicial review proceedings where executive action limits Convention rights.

The adequacy of the traditional English (and New Zealand) heads of judicial review has been considered by the European Court under three provisions of the Convention: Articles 5(4) (right to habeas corpus), 6(1) (right of access to the courts) and 13 (right to an effective remedy). Under each of those provisions, the European Court has held that the traditional heads are inadequate to protect rights as they are too limited in scope or too deferential to allow the reviewing court to consider the proportionality of executive limits placed on rights.[4] This body of European case law as well as two other developments led the English courts to adopt proportionality as a stand-alone head of review in cases involving Convention rights: the first development was that the Convention was incorporated into municipal law by the Human Rights Act 1998 (UK) making Convention rights directly enforceable in domestic courts; the second development was the landmark decision of *Smith and Grady v United Kingdom*,[5] in which the European Court held that a heightened scrutiny approach to judicial review cases involving human rights which required the government to justify any limits placed on rights was inadequate to protect rights from disproportionate infringement.[6] Proportionality was finally adopted as a discrete head of review in *R (Daly) v Secretary of State for the Home Department*,[7] and applies in place of the *Wednesbury* standard where incorporated Convention rights are prima facie infringed.

In the New Zealand context, Wild J's comments in *Powerco* are by no means the first judicial consideration of proportionality or a departure from the unitary *Wednesbury* standard. *Powerco* is the latest instalment in a developing trend in New Zealand administrative law: over time, the courts have come to adopt a varying standard of review depending on the interests at issue, and have increasingly considered proportionality to be a guiding principle in the reasonableness analysis.

Over time, the "sliding scale" approach to judicial review proceedings, and a corresponding robust approach to executive decisions bearing on human rights have crystallised into concrete

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4 See for example *Weeks v United Kingdom* (1987) 10 EHRR 293 (ECHR); *Kingsley v United Kingdom* (2002) 35 EHRR 10 (ECHR); *Tinnelly & Sons Ltd and McElduff v United Kingdom* (1998) 27 EHRR 249 (ECHR); *Chahal v United Kingdom* (1996) 23 EHRR 413 (ECHR).

5 *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 (Section III, ECHR) [*Smith*].

6 *Smith*, above n 5, paras 129–139 Judgment of the Court.

7 *Daly*, above n 3.

principles of administrative law. This was affirmed in *Powerco*,[8] and in the recent case of *Progressive Enterprises* where Baragwanath J said:[9]

> [T]here is a continuum of approaches to judicial review, which will be of greater or less intensity according to the nature of the case and especially the respective competence and experience of the decision-maker and of the Court.

At one end of the spectrum are local body rating cases, while the most exacting standard will be applied where fundamental rights are at stake.[10] In England, it was this "anxious scrutiny" approach to human rights cases that was the precursor to proportionality review.[11]

Recently Professor Taggart indicated that the anxious scrutiny approach to human rights cases may now have been subsumed by the proportionality principles.[12] The linkage between the two standards was recently noted by Baragwanath J when he described the anxious scrutiny approach as "[o]ur nearest equivalent" to proportionality review.[13] Whether the anxious scrutiny approach has been subsumed or not, proportionality has become a guiding principle in the reasonableness inquiry, particularly in human rights cases.[14] This is borne out by the New Zealand case law over the last 15 years. In *Isaac v Minster of Consumer Affairs*,[15] Tipping J, drawing on the then current English precedents, rejected proportionality as a discrete head of review, saying: "In truth I do not consider that the so-called principle of proportionality is anything other than a criterion upon which the Courts should consider whether a decision is unreasonable."[16] Roughly seven years later, Thomas J in *Waitakere City Council v Lovelock*,[17] leaving open the possibility that proportionality may in time be adopted as a separate head, echoed Tipping J's approach that "[proportionality] becomes a

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8 *Powerco*, above n 1, para 23 Wild J.

9 *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72, para 70 (HC) Baragwanath J [*Progressive*]; see further *A v The Chief Executive of the Department of Labour* (19 October 2005) HC AK CIV-2004-404-6314, para 30 Winkelmann J.

10 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) paras 22.1, 22.3; see also Michael Taggart "Administrative Law" [2006] NZ L Rev 75, 84–85.

11 See *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (HL); *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (HL); *R v Ministry of Defence, ex parte Smith* [1996] 1 All ER 257 (CA); *R v Secretary of State for the Home Department, ex parte Amjad Mahmood* [2001] HRLR 14 (CA).

12 See Taggart, above n 10, 84.

13 *Progressive*, above n 9, para 70 Baragwanath J.

14 See Taggart, above n 10, 84.

15 *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 (HC).

16 *Isaac v Minister of Consumer Affairs*, above n 15, 636 Tipping J.

17 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) [*Lovelock*].

value or principle which the Courts can utilise in judging whether or not an authority has acted unreasonably."[18]

Since *Lovelock*, there have been an increasing number of High Court and Court of Appeal judgments that have discussed proportionality with reference to the European jurisprudence. In *Wolf v Minister of Immigration*,[19] Wild J took a cautious approach noting (as he did in *Powerco*[20]) that the *Wednesbury* threshold was a necessarily stringent one because constitutionally it was important that the court did not scrutinise the merits of executive decisions.[21] Wild J concluded that, absent the driver of Convention rights and the Human Rights Act 1998 (UK), the current role for proportionality in New Zealand law was unclear.[22] In the Christchurch brothels case, *Willowford Family Trust v Christchurch City Council*,[23] Panckhurst J considered submissions contending that certain Council bylaws which placed restrictions on the location of brothels were disproportionate in their effect. Panckhurst J discussed proportionality review, noting *Wolf*, and decided to err on the side of established principle, believing that it was not a case "in which to seek to define the outer edge of the jurisdiction to review bylaws."[24] Other High Court judges have taken a less conservative approach. For example, in *Refugee Council of New Zealand v Attorney-General*, Baragwanath J tied the reasonableness and proportionality standards together in his conclusion:[25]

> If as I provisionally consider s128A applies, such policy not only infringes Article 31.2 but falls outside the legitimate range of executive discretion available in terms of the *Wednesbury* and proportionality tests that engage judicial review.

Proportionality has also been considered in two relatively recent Court of Appeal decisions. In *ICANZ v Bevan*, Keith J left open the question whether proportionality should represent a separate

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18 *Lovelock*, above n 17, 408 Thomas J.

19 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC) [*Wolf*].

20 *Powerco*, above n 1, para 22 Wild J.

21 *Wolf*, above n 19, paras 28, 35 Wild J.

22 *Wolf*, above n 19, para 35 Wild J.

23 *Willowford Family Trust v Christchurch City Council* (29 July 2005) HC CHCH CIV-2004-409-002299 [*Willowford*].

24 *Willowford*, above n 23, para 70 Panckhurst J. Recently Asher J and Knight have indicated that the test for assessing the reasonableness of bylaws (set down in *McCarthy v Madden* (1914) 33 NZLR 1251 (SC)) essentially involves a proportionality analysis: see *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787, para 102 (HC) Asher J; Dean Knight "Brothels, Bylaws, Prostitutes and Proportionality" [2005] NZLJ 423.

25 *Refugee Council of New Zealand v Attorney-General (No 1)* [2002] NZAR 717, para 111 (HC) Baragwanath J.

ground of review,[26] and in *Thompson v Treaty of Waitangi Fisheries Commission*, Hammond J considered the "close scrutiny" approach, proportionality review, and the American "hard look" doctrine but said that the case did not lend itself to "such a searching examination."[27] He said that whether *Wednesbury* should be finally interred and replaced with a wider ranging unitary standard of review "would be a matter for anxious consideration."[28]

Thus, while proportionality does not represent a discrete head of review in New Zealand, there is an identifiable trend towards its recognition, particularly in human rights cases. The trend is evidenced by the development of the anxious scrutiny and proportionality standards of reasonableness review where rights are at stake, as well as the increasing frequency with which courts have discussed proportionality review, in an environment where Convention and European-influenced English jurisprudence is increasingly relied on by New Zealand courts. The path the New Zealand courts have taken thus far has mirrored that of the English courts leading up to the adoption of proportionality review: the English courts first adopted the close scrutiny test, considered proportionality an element of unreasonableness, and then, over time, formally accepted proportionality as a discrete head.

B Proportionality Review: Canvassing the Issues

These references to proportionality raise a number of questions about whether proportionality ought to be established as a discrete head of review in New Zealand. For the purposes of this comment, I do not attempt a conclusive analysis of what is a complex area of administrative law, but simply seek to canvass four main issues that arise.

First, proportionality possesses key benefits over the traditional *Wednesbury* head. The proportionality approach is "more precise and more sophisticated than the traditional grounds of review."[29] Proportionality review, by requiring the courts to substantiate their decisions in terms of the specific suitability, necessity and proportionality questions, reduces the capacity for judges to deliver judgments on the basis of policy or personal preference[30] (or the perception of such

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26 *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154, para 55 (CA) Keith J for the Court.

27 *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9, paras 208–223 (CA) Hammond J [*Thompson*].

28 *Thompson*, above n 27, para 221 Hammond J.

29 *Daly*, above n 3, para 27 Lord Steyn; See also Paul Craig "Unreasonableness and Proportionality in UK Law" in Evilyn Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999) 85, 99–100.

30 Jeffrey Jowell and Anthony Lester "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368, 381.

practice), and provides for more transparent, structured, and consistent decision-making than the potentially amorphous "reasonableness" inquiry.[31] The proportionality approach also gives executive decision-makers greater capacity to ensure their decisions are made within legal limits, as it allows them to analyse their decisions on the basis of a more certain three-point test, rather than trying to predict what a judge will see as reasonable.

Proportionality affords greater protection to fundamental rights by providing a greater intensity of review. Lord Steyn in *Daly* described three concrete differences between proportionality and the traditional heads. First, "proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions."[32] Secondly, the proportionality head of review may go further than the traditional heads "inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations."[33] Thirdly, the anxious scrutiny test developed by the courts may not go far enough in securing the protection of human rights.[34] His Lordship put particular emphasis on *Smith and Grady v United Kingdom*, where the English Court of Appeal (applying the anxious scrutiny test) and European Court (applying proportionality) came to different conclusions as to the legality of the executive policy.[35]

The second issue is that some question the adoption of proportionality review on the basis that it is merits review, and would represent a constitutionally inappropriate incursion upon the executive's sphere of decision-making.[36] While some caution is required, there are relatively strong and coherent arguments that proportionality does not violate constitutional principle. In part, these arguments fit comfortably alongside Professor Taggart's recently-made point that:[37]

> [M]any of the dichotomies upon which administrative law has rested – appeal/review, merits/legality, process/substance, discretion/law, law/policy, fact/law – are no longer seen as giving as much guidance as they once did, and they are being replaced or blurred by more context-sensitive doctrines.

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31 See further Gareth Wong "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" [2000] PL 92, 104, 108–109; Taggart, above n 10, 88.

32 *Daly*, above n 3, para 27 Lord Steyn.

33 *Daly*, above n 3, para 27 Lord Steyn.

34 *Daly*, above n 3, para 27 Lord Steyn.

35 The European Court held that the threshold at which the English courts could find a policy irrational under *Wednesbury* was so high that it effectively excluded any consideration of the proportionality of executive limits: *Smith*, above n 5, para 138 Judgment of the Court.

36 Wild J eludes to this in *Wolf*, above n 19, paras 26, 28, 35.

37 Taggart, above n 10, 83. This contrasts with Wild J's view in *Powerco* that judicial review remains "firmly" focused on process: *Powerco*, above n 1, para 22.

Proportionality review entails a similar legal analysis to that required by the traditional heads, and constitutes merits review no more than those heads. While the three-pronged proportionality test requires the court to consider the substance of the executive decision, this is also true of the traditional heads. For example, in deciding whether the decision-maker has taken into account irrelevant considerations, the judge must consider the considerations taken into account, the way the decision-maker prioritised those considerations, and how they relate to the final decision. The judge must make up his or her own mind as to what is irrelevant and what is relevant. Even under the most deferential form of *Wednesbury*, a judge is called upon to consider the reasonableness of the decision – this assessment entails a challenge as to the substance of the decision, not merely the procedure gone through.[38] To propose a more exacting standard under proportionality review is no different in principle and represents no more a usurpation of constitutional propriety than the *Wednesbury* ground.[39] Judges are not being asked to supplant the executive decision with their own, they are simply being called upon to assess whether the executive has gone further than needed to achieve its goal;[40] the goal itself is not questioned.

This is not to say that proportionality could not lead to courts questioning the merits of executive decisions. However, Rivers has suggested two mechanisms by which courts can ensure they do not exceed their constitutional or institutional limits.[41] Judicial "restraint" in the application of the proportionality test serves to ensure the legitimacy of the courts' role on review, and "operates to preserve to non-judicial bodies a range of necessary/efficient options."[42] The degree of restraint will vary: if a limit is minor, the courts will be unwilling to question the decision-maker's view, but as the limitation becomes greater, courts will reduce the set of acceptable options open to a decision-maker and require more argument and evidence to be convinced that the countervailing public interest justifies the limit on the right. The established doctrine of judicial deference serves to ensure that courts do not exceed their institutional expertise.[43] The degree of deference afforded by the courts will vary according to the confidence the court can place in the competence of the other

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38 Jowell and Lester, above n 30, 369–371.

39 Sir John Laws "Is the High Court the Guardian of Fundamental Constitutional Rights" [1993] PL 59, 69.

40 See further Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, 681.

41 Julian Rivers "Proportionality and the Variable Intensity of Review" (2006) 65 CLJ 174.

42 Rivers, above n 41, 203.

43 See further Lord Steyn "Deference: A Tangled Story" [2005] PL 346; Jeffrey Jowell "Judicial Deference: Servility, Civility or Institutional Capacity" [2003] PL 592; contrast *R v BBC, ex parte Prolife Alliance* [2003] UKHL 23, paras 75–76 (HL) Lord Hoffmann.

body. As Rivers convincingly argues, the ease with which the courts should accept the executive's account as reliable will rest on the seriousness of the limit placed on the right:[44]

> This does not mean that the court increasingly displaces the executive and the legislature in matters of factual expertise and policy-choice. Rather, it means that the more serious a limitation of rights is, the more evidence the court will require that the factual basis of the limitation has been correctly established, and the more argument it will require that alternative, less intrusive, policy-choices are, all things considered, less desirable.

Thirdly, there is the impact of the New Zealand Bill of Rights Act 1990 (NZBORA). Adoption of proportionality in administrative law would be consistent with the obligations under the Act. Section 5 states that the rights enumerated in the NZBORA may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The current approach to the section 5 inquiry, laid down in *Moonen*, is closely analogous, if not identical, to the European proportionality framework of rational connection, necessity, and proportionality, in other words "[a] sledge hammer should not be used to crack a nut."[45] There are strong arguments that, just as the English courts apply the proportionality test in judicial review proceedings where Convention rights are subject to executive limits, so too should the New Zealand courts apply the section 5 proportionality test on review where NZBORA rights are at stake.

There are also arguments for the adoption of proportionality based on the obligation to provide effective remedies for rights breaches.[46] As authority, one could cite *Smith and Grady v United Kingdom*, where the European Court found the traditional review threshold to be too high to enable domestic courts to properly scrutinise the proportionality of executive limits, and thus provide an effective remedy when those limits are disproportionate.[47]

Finally, there is the question, raised by Wild J in *Powerco*, whether proportionality has a role beyond human rights cases.[48] In *Daly*, Lord Cooke of Thorndon indicated that the higher proportionality standard of review may come to supplant *Wednesbury* altogether.[49] His Lordship believed that the day would come when *Wednesbury* is more widely recognised as "an unfortunately

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44 Rivers, above n 41, 205.

45 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para 18 (CA) Tipping J for the Court; see also *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) Richardson J.

46 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA). This obligation has been held to include remedies by way of judicial review: *R v Goodwin* [1993] 2 NZLR 153, 191–192 (CA) Richardson J.

47 *Smith*, above n 5, paras 129–139 Judgment of the Court.

48 *Powerco*, above n 1, para 15 Wild J.

49 *Daly*, above n 3, paras 30, 32 Lord Cooke of Thorndon.

retrogressive decision" and that "[i]t may well be … that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."[50] In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*,[51] Lord Slynn said that proportionality should be recognised as part of English administrative law not only in cases invoking European law but also when dealing with executive action subject to domestic law.[52] His Lordship continued: "Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing."[53] The extension of proportionality review was later argued for before the English Court of Appeal.[54] The Court, while enthusiastic, felt that such a development was best left to the House of Lords.[55]

There are good arguments for proportionality to sweep the field, some of the strongest being: the greater sophistication and structure of the proportionality test; the greater protection afforded to individuals and groups vis-à-vis the state; and the view that any executive action that is excessive as to needs is unjustifiable, and that distinguishing between human rights and other cases in this respect is arbitrary. There are, however, potential difficulties. First, not all cases may fit neatly into the "individual or group interest versus public interest" paradigm in the way human rights cases naturally do. Secondly, it may be undesirable to give such weight to the interests of individuals or groups (essentially equal status with fundamental rights). In this vein, Professor Taggart has said that:[56]

> The "balancing exercise" required by proportionality methodology means that consideration of weight is inevitable. That may not be appropriate in other types of cases, and for that reason some want to retain the option of deploying the flexible *Wednesbury* (un)reasonableness standard in order to signal that review is not always a good thing, and less intensive review might be more constitutionally appropriate.

One way to deal with this could be to apply a "sliding scale" of intensity approach in the application of proportionality review, although this would reproduce some of the same uncertainty inherent in the current *Wednesbury* standard.

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50 *Daly*, above n 3, para 32 Lord Cooke of Thorndon.

51 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 (HL) [*Alconbury*].

52 *Alconbury*, above n 51, para 51 Lord Slynn of Hadley.

53 *Alconbury*, above n 51, para 51 Lord Slynn of Hadley.

54 *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] 3 WLR 80, paras 32–37 (CA) Dyson LJ for the Court [*Far East Region*].

55 The Court observed that the case for proportionality completely supplanting *Wednesbury* was "indeed a strong one": *Far East Region*, above n 54, para 34 Dyson LJ for the Court.

56 Taggart, above n 10, 89.

On the other hand, if proportionality and *Wednesbury* were to coexist, there would be problems associated with defining when one or the other applies. In the English context, this issue is made simple by the fact that proportionality is applied only where Convention rights are at stake. Taggart has said that if the two are to successfully live together in New Zealand:[57]

> [T]he development of criteria for applying one rather than the other is rather urgent. The criterion of "human rights" is simply too blunt.

I would suggest that one solution is that, given the NZBORA discussion above, New Zealand could follow the English lead with proportionality review only being available where rights enumerated in the NZBORA are prima facie limited.

IV CONCLUSION

Proportionality is a tool by which courts can ensure good executive decision-making. Proportionality need not detract from the fulfilment of public goals but insists that public authorities pay sufficient regard to the interests of individuals in resolving on the methods of achieving their objectives;[58] it is a rational device for the optimisation of interests.[59] Proportionality promotes structure and transparency in review proceedings, serves to better protect human rights without compromising the constitutional or institutional balance between the courts and executive, and is arguably called for by the NZBORA. While I do not venture to predict whether the courts will take the next step suggested by the case law trends, and come to adopt proportionality as a stand-alone head in human rights cases, or even finally inter *Wednesbury*, I would suggest that it is a matter well suited and destined for our Supreme Court.

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57 Taggart, above n 10, 89.

58 Robert Thomas *Legitimate Expectations and Proportionality in Administrative Law* (Hart Publishing, Oxford, 2000) 97.

59 Rivers, above n 41, 207.