JOINT MINISTERIAL DECISION-MAKING AND LEGAL ACCOUNTABILITY

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ABSTRACT

This paper explores how judicial review operates when joint ministerial decisions are challenged, and examines whether this form of decision-making has any effects on the ministers' legal accountability.

New Zealand statutes appear to contain only a few instances of joint ministerial decision-making, except for shareholding ministers in commercial contexts. Case law provides little guidance on judicial review of joint decisions in other contexts, although a recent case relating to the creation of marine reserves held that joint decision-making ministers must make separate and independent decisions. The recent decision of the Minister of Conservation to decline a proposal for a marine reserve in Akaroa Harbour, before reaching the stage where concurrence of the Minister of Fisheries was required, suggests that one minister's decision may be affected by what the other minister is anticipated to decide.

In 2010, the National Government decided to amend the process for gaining access to Crown land for mining, so that joint approval by the Minister of Conservation and the Minister of Energy and Resources is required, instead of approval by the landholding minister alone. The Parliamentary Commissioner for the Environment strongly criticised this proposal. The question of how such joint decisions may be challenged appears likely to become controversial in future.

This research involves a thorough search of New Zealand statutes to locate instances of joint ministerial decision-making, and any relevant case law, commentary, or guidance to decision-makers through policy materials. Against that background, the paper considers the availability and scope of judicial review of joint ministerial decisions, particularly the likely grounds and threshold of review. The general body of administrative law is also used to inform this analysis. The research concludes that ministers making joint decisions are likely to be less legally accountable than ministers making decisions alone.

CONTENTS

List of Abbreviations

DOC	Department of Conservation
EDS	Environmental Defence Society
MER	Minister of Energy and Resources
MFISH	Ministry of Fisheries
MOC	Minister of Conservation
MOF	Minister of Fisheries
OIA	Official Information Act 1982
PCE	Parliamentary Commissioner for the Environment

Table of Cases

Cases from New Zealand

Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation [2006] NZAR 265 (HC).

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Singh v Chief Executive, Department of Labour [1999] NZAR 258 (CA).

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Tamaki Reserve Protection Trust Inc v Minister of Conservation HC Auckland CP600/97, M1915/97, 12 March 1999.

Vea v Minister of Immigration [2002] NZAR 171 (HC).

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British Oxygen Co Ltd v Minister of Technology [1971] AC 610 (HL).

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R v Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26, [2001] 2 AC 532.

Table of Legislation

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Fisheries Act 1996.

Marine Mammals Protection Act 1978.

Marine Reserves Act 1971.

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Overseas Investment Act 2005.

State Sector Act 1988.

Wellington Airport Act 1990.

Wildlife Act 1953.

Introduction

This paper considers joint decision-making, a process in which two or more decision-makers share statutory responsibility for a single decision. The National Government's recent proposal to introduce joint decision-making by two ministers in respect of access to Crown land for mining has triggered concerns about accountability from the Parliamentary Commissioner for the Environment ("PCE"). This paper argues that joint ministerial decision-making tends to reduce legal accountability, because such decisions may be harder to challenge via judicial review than decisions by a single minister.

In 2010 the Government reviewed the Crown Minerals Act 1991 and proposed removing some areas from Schedule 4 to facilitate mining.[1] Schedule 4 includes national parks, various types of reserves, and land held under the Conservation Act 1987. Currently the Minister of Conservation ("MOC") has limited ability to accept applications for access to mining in Schedule 4 areas.[2] Due to public opposition, the Government no longer proposes removing areas from Schedule 4.

However, Cabinet has resolved to change the decision-making process for applications for access to Crown land for mining activities.[3] Such decisions are presently made by the landholding minister, usually MOC. Cabinet intends to change the process so that decisions on access are made jointly by the landholding minister and the Minister of Energy and Resources ("MER"), despite 96 per cent of submitters opposing the change because it would enable mining companies to gain easier access to Crown land.[4] Amendments to the Crown Minerals Act 1991 were envisaged to begin in 2010,[5] but have not yet been passed.

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[1] Ministry of Economic Development *Maximising our Mineral Potential: Stocktake of Schedule 4 of the Crown Minerals Act and beyond – Discussion Paper* (2010) Ministry of Economic Development at 14 <www.med.govt.nz> Accessed 8 March 2011.
[2] Crown Minerals Act 1991, s 61(1A).
[3] Ministry of Economic Development and Department of Conservation *Cabinet Paper* 20 July 2010 Ministry of Economic Development at 1-2 <www.med.govt.nz> Accessed 8 March 2011.
[4] Ministry of Economic Development *Maximising our Mineral Potential: Stocktake of Schedule 4 of the Crown Minerals Act and beyond - Summary of Submissions* (2010) Ministry of Economic Development at 150-151 <www.med.govt.nz> Accessed 8 March 2011.
[5] Ministry of Economic Development and Department of Conservation *Cabinet Paper,* above n 3, at 10.

Cabinet rejected other options for change, such as amending the matters considered by the landholding minister, or requiring the landholding minister to have regard to the views of MER. Those options were not considered to provide "a balanced consideration of nationally significant mineral and economic potential alongside the landholder's own interests".[6]

PCE criticised the joint decision-making proposal as a "profound change" that "cuts across the fundamental separation of functions and powers" in the current system.[7] Accountability was a particular concern:[8]

> Currently…[the Minister of Conservation] as the sole decision maker is accountable to the public for safeguarding the conservation estate. The Minister is both responsible for the decision made and accountable for the outcome – the effect on the conservation estate.
>
> In contrast, if the Minister of Energy and Resources becomes a joint decision maker, then the power to make access decisions will be shared, but the accountability for the outcome will not.
>
> It is a basic principle of good governance that power and accountability are aligned.
>
> Underlying the Government's proposals is the principle of balancing conservation and economic values. This is at odds with the principle…that conservation should take precedence on the land managed by the Department of Conservation.

PCE's criticisms seem to envisage reduced public accountability. MOC is perceived as broadly responsible for everything occurring on conservation land. Giving some power to MER in respect of access to that land may reduce MOC's power, without giving MER any ongoing accountability for conservation land. However, political accountability would not alter; both Ministers would remain accountable to the House of Representatives, following constitutional convention.[9]

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[6] Ministry of Economic Development *Discussion Paper,* above n 1, at 18.
[7] Parliamentary Commissioner for the Environment *Making difficult decisions: mining the conservation estate* (2010) Parliamentary Commissioner for the Environment at 5 <www.pce.parliament.nz> Accessed 4 March 2011.
[8] Ibid, at 26.
[9] Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 89.

The criticisms also seem to envisage reduced accountability for conservation legislation. Depending on how the new joint decision-making provision is drafted, both Ministers may have to balance the purposes of conservation and energy legislation when deciding on a particular application. But MER has no ongoing responsibility for conservation legislation. If a particular joint decision requires MOC to make a compromise between conservation and energy principles, this could reduce MOC's ongoing ability to manage that particular area of conservation land in accordance with conservation legislation.

Parliament presumably envisaged such compromises, which are a logical consequence of joint decision-making. But PCE appears to consider them undesirable from a public policy viewpoint, assuming that reduced accountability for conservation legislation is the intended meaning of "accountability" in PCE's report.

Although PCE's concerns seem to focus on political accountability, the report triggers further concerns about reductions in legal accountability. If the addition of a second decision-making minister makes it harder for applicants to succeed on judicial review, then legal accountability would also be reduced.

This paper explores the legal meaning of "accountability" by focusing on how judicial review of joint ministerial decisions would operate. An analysis of joint decision-making is timely since Cabinet is clearly committed to the proposed changes, despite criticisms by PCE and numerous submissions in opposition.

Chapter One examines what is meant by joint decision-making, and outlines the methodology used in the research for this paper. Chapter Two describes the research results and shows how joint decision-making provisions can be divided into two basic models. This paper refers to the first model as "concurrence", where one minister typically undertakes the steps towards a decision, and another minister concurs with or consents to that decision. The second model is referred to in this paper as "equal participation", where the ministers conduct all the decision-making steps together with no distinction in roles.

Chapter Three discusses general issues that may arise for applicants seeking judicial review of all types of joint ministerial decisions, such as justiciability and relief. Chapters Four and

Five take a more speculative approach. These two chapters explore how judicial review might operate for the different models of joint decision-making, by examining hypothetical scenarios that seem likely to arise, but may be particularly difficult for applicants to challenge. The paper concludes that joint decision-making tends to reduce legal accountability, due to the extra hurdles it creates on judicial review.

Chapter One: Scope and Methodology

1.1 Defining joint decision-making and focusing on ministers

Joint decision-making is not defined in key New Zealand judicial review and public law textbooks, although it is discussed in the context of particular grounds of review, such as surrendering discretion.[10] Similarly, a well-known judicial review textbook from the United Kingdom does not define joint decision-making, although relevant grounds of review are discussed.[11] This paper defines joint decision-making as the situation where two or more decision-makers have statutory responsibility for the same decision.

Although joint decision-making can involve any public officials as decision-makers, this paper focuses on decisions by two or more ministers for several reasons. First, tensions in decision-making may be more likely where all decision-makers are ministers, because ministers are involved in policy rather than day-to-day departmental management,[12] and each minister has different portfolios and expertise.

Second, the high status of ministers means that Parliament is unlikely to require ministers to make low-level decisions. Where Parliament requires joint ministerial decisions, the subject-matter is likely to be controversial, and Parliament probably intends the ministers to arrive at a compromise between different perspectives.

Third, the Government proposes to introduce joint ministerial decision-making in respect of access to Crown land for mining. Consequently, an analysis of possible difficulties for applicants seeking judicial review of joint ministerial decisions is relevant because such litigation seems likely in future.

[10] Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 907-909; G D S Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at 774.
[11] Michael Fordham *Judicial Review Handbook* (5th ed, Oxford, Portland, 2008) at 475-482.
[12] State Sector Act 1988, ss 32-33, 48.

The original intention was to include joint decisions by ministers and senior officials in the research, as well as joint ministerial decisions. But relevant case law considered mostly the latter. Further, searches in the Brookers database of New Zealand statutes for provisions involving ministers and senior officials produced many irrelevant hits. Often these hits involved situations where decision-makers were working under the same legislation in the same ministry, with a minister having responsibility for the final decision.[13] These provisions created administrative steps rather than joint decisions. Therefore, this research is limited to ministers only.

The scope is limited to New Zealand because a comparison of joint decision-making in other jurisdictions has little relevance, since the Government appears committed to introducing joint decision-making on access to Crown land for mining. An analysis of how judicial review of joint ministerial decisions would operate in New Zealand, and whether PCE's concerns are justified, will have more practical use.

Joint decision-making provisions may involve either concurrence, where the second minister effectively has the final say, or equal participation, where both ministers act together. This paper considers how judicial review would operate for both models. However, it excludes situations where statutes require a minister to consult with others. Consultation requires decision-makers to listen with an open mind, but does not oblige them to negotiate towards an agreement.[14] Such decisions effectively have a single decision-maker and are not considered to be joint decisions.

1.2 Methodology

The first research step was to determine how and where joint decision-making is currently used in New Zealand. Since well-known textbooks did not discuss the topic,[15] searches using

[13] For example, see s 17B of the Conservation Act 1987, whereby the Director-General of Conservation may prepare draft statements of general policy, to be approved by the Minister of Conservation; s 17F of the Conservation Act 1987, whereby the Director-General of Conservation may prepare draft conservation management strategies, with input from the Minister of Conservation, to be approved by the New Zealand Conservation Authority; and s 68 of the Fisheries Act 1996, whereby the Minister of Fisheries may create additional annual catch entitlements, and the Chief Executive is responsible for allocating them.

[14] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 27-28, 30.

[15] Joseph *Constitutional and Administrative Law in New Zealand*, above n 10; R D Mulholland *Introduction to the New Zealand Legal System* (9th ed, Butterworths, Wellington, 1999); Taylor *Judicial Review: A New Zealand Perspective,* above n 10.

a wide range of databases, websites and journals were made. These too failed to yield any relevant information.[16]

The second research step involved a thorough search of the Brookers database of New Zealand statutes. Brookers was chosen because it links statutory provisions with relevant case law, thus eliminating the need for additional case law searches. The aim was to establish a baseline of information by locating and analysing statutory provisions requiring joint ministerial decisions.

The process involved searching for the word "Minister", in proximity to other instances of "Minister" and to five keywords ("agree", "concur", "consent", "decision" and "joint"). Appendix One contains a detailed description of the search parameters. Repealed provisions were excluded because it was considered that any case law on these would carry little weight. Appendix Two provides the search results, search terms, and a description of the statutory provisions.

The third research step involved analysing any case law linked to the provisions found in Brookers. The aim was to locate relevant case law on joint ministerial decision-making, to assist in examining whether this form of decision-making affects legal accountability.

A further research step was added during analysis of New Zealand case law, because there were few New Zealand cases involving direct challenges to joint ministerial decisions. A search for cases from the United Kingdom was therefore undertaken, on the rationale that if a body of persuasive case law existed, the New Zealand courts would probably draw on it. Searching on the same keywords used in Brookers produced no relevant results in LexisNexis. Therefore, Fordham's judicial review textbook[17] was used as a guide to locate relevant cases, particularly the sections on fettering discretion and acting under dictation. Key cases from the United Kingdom were located by this method.[18]

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[16] Databases searched were Academic OneFile, Ebsco, Google Scholar, Hein Online, JSTOR and LexisNexis. Websites searched were www.mfe.govt.nz (Ministry for the Environment), www.pce.parliament.nz (Parliamentary Commissioner for the Environment) and www.qualityplanning.org.nz (Quality Planning). Journals searched included the New Zealand Journal of Environmental Law, the New Zealand Journal of Public and International Law and the New Zealand Law Review.

[17] Fordham, above n 11.

[18] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL); *H Lavender and Son Ltd v Minister of Housing and Local Government* [1970] 3 All ER 871 (QB).

The final research step involved searching for information on how ministers approached joint decision-making. It was thought that ministers named in the statutory provisions found in Brookers might have received internal advice about appropriate processes to follow when making those decisions. Therefore, four requests were made under the Official Information Act 1982 ("OIA").

MOC and MER were asked to supply advice regarding joint decision-making under the Wildlife Act 1953, and in the review of the Crown Minerals Act 1991. MOC and the Minister of Fisheries ("MOF") were asked to supply advice regarding joint decision-making on population management plans and marine reserves. MOF and the Overseas Investment Office were also asked to supply internal documents regarding joint decision-making on overseas applications to hold fishing quota under the Fisheries Act 1996 and the Overseas Investment Act 2005.

Overall, the research produced a body of information consisting of: statutory provisions from New Zealand requiring joint ministerial decisions; relevant case law from New Zealand and the United Kingdom; and internal documents released by ministries and government departments under the OIA. The research results are discussed in Chapter Two.

Chapter Two: Results and Analysis

2.1 Statutory provisions requiring joint ministerial decisions

Most of the joint ministerial decision-making provisions found in Brookers occurred in commercial and/or financial contexts. Joint decision-making also occurred in conservation contexts, especially the marine environment. Other contexts where joint decision-making provisions were found, although less frequently, included: coastal permits; employment and immigration; media; mineral resources; overseas investment; transport; and treatment of detained persons. Appendix Three shows the contexts in which joint decision-making provisions occurred, how many provisions were found, and the model of decision-making that was used.

In commercial contexts, the most common model of joint decision-making was equal participation. Many provisions gave powers to two or more ministers in respect of forming companies and transferring assets and liabilities to them. These provisions generally conferred broad powers on ministers, rather than listing criteria to guide the ministers' discretion. Exceptions to this situation were the regional fuel tax and overseas investment provisions, which provided detailed criteria (see Appendix Two).

Concurrence provisions were slightly more common overall. These provisions often occurred in financial contexts, and required concurrence from the Minister of Finance for decisions about remuneration. These provisions did not contain detailed criteria.

Another group of concurrence provisions occurred in the conservation context, involving the same two Ministers. In respect of marine mammal sanctuaries, marine reserves and population management plans, MOC makes decisions about the creation of the document or area, and MOF must concur with or consent to MOC's decision. This group of provisions provided detailed criteria for MOC, but not for MOF.

No provisions were found where MOF was dependent on another minister's concurrence. In the context of overseas investment in fishing quota, involving MOF and the Minister

responsible for overseas investment, the model of joint decision-making used was equal participation.

2.2 Types of joint decisions and examples of legislative schemes

The joint decision-making provisions located in Brookers were analysed as falling into two basic models. The first model involved concurrence. Usually such decisions were provided for by a single statutory provision, typically with one minister undertaking the steps towards a decision, and another minister or ministers concurring with it. The second model involved equal participation, with all ministers acting together.

Section 5 of the Marine Reserves Act 1971 is an example of concurrence. The process of creating a marine reserve begins with an application by one of a group of permitted applicants. Objections may be made to the Director-General of Conservation, and are then referred to MOC, who must decide whether to uphold any objections before considering the application. If MOC considers that no objection should be upheld, then MOC can recommend the making of an Order in Council creating the marine reserve, if the Ministers of Fisheries and Transport concur. Detailed criteria are only provided for MOC.

Section 7 of the Wellington Airport Act 1990 is an example of equal participation. That section provides that the Ministers of Transport and Finance may prepare a list of the airport assets that the Ministers consider should be vested in the airport company created under the Act. The list must describe the assets and provide a valuation for each, but the section provides no further guidance on what criteria the Ministers should consider.

Another example of equal participation is provided by sections 56-58B of the Fisheries Act 1996 (incorporated in the Overseas Investment Act 2005).[19] Consent from MOF and the Minister of Finance is required for any overseas investment in fishing quota. Detailed criteria are provided for both Ministers.[20]

[19] Fisheries Act 1996, s 57A(2)(a).
[20] Ibid, ss 57E, 57G-I.

Only one statutory provision located in Brookers did not fall neatly into the concurrence or equal participation models. This was s 71 of the Wildlife Act 1953. Together with the Coal Mines Act 1979 and the Crown Minerals Act 1991, this provision creates a legislative regime that differs from other joint ministerial decision-making decisions found in this research. Mining licences are issued under the Crown Minerals Act 1991 (formerly the Coal Mines Act 1979). Section 71 of the Wildlife Act 1953, however, provides that acts authorised under the mining statutes that are also acts in respect of wildlife can only be done with the consent of MOC and the Minister in charge of the relevant mining statute.[21]

This legislative scheme is similar to concurrence in that once a mining licence has been granted, the Minister in charge of the mining statutes is unlikely to refuse consent to do an act in respect of wildlife. So the crucial decision is made by MOC, as if MOC had a concurrence role. But s 71 of the Wildlife Act 1953 also has similarities with equal participation, because it requires both Ministers to give consent, without defining any particular roles or giving one Minister the upper hand. No other legislative schemes like this were found.

2.3 Case law

Only a few relevant New Zealand cases were found. Most of the joint decision-making provisions either had no cases listed in Brookers, or had been litigated on issues other than joint decision-making. Where judicial review of joint ministerial decisions had occurred, the context was usually environmental legislation.

The meaning of "concurrence" was examined by the Court of Appeal in *CRA3 Industry Association Inc v Minister of Fisheries*.[22] No other cases on concurrence were found. The proper relationship between ministers making joint decisions by equal participation was briefly discussed in *Wellington International Airport Ltd v Air New Zealand*.[23] The duty of ministers to give reasons for an equal participation decision on overseas investment in fishing quota was examined in *Talleys Fisheries Ltd v Cullen*.[24]

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[21] *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2006] NZAR 265 (HC) at [10]; *Save Happy Valley Coalition Inc v Minister of Conservation* HC Auckland CIV-2006-485-1634, 6 December 2006.
[22] *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345 (CA).
[23] *Wellington International Airport Ltd v Air New Zealand*, above n 14.
[24] *Talleys Fisheries Ltd v Cullen* HC Wellington CP287/00, 31 January 2002 (HC).

The legislative scheme regarding acts in respect of wildlife was considered in cases involving Solid Energy's proposal to relocate native snails as part of its mining activities.[25] Another of the snails cases, *Save Happy Valley Coalition Inc v Minister of Conservation,*[26] examined the relationship between ministers making decisions under that legislative scheme.

Two key cases from the United Kingdom were found. *British Oxygen Co Ltd v Minister of Technology* held that decision-makers exercising statutory discretions must not shut their ears to applications by relying on overly rigid policies.[27] In *H Lavender and Son Ltd v Minister of Housing and Local Government*, the policy at issue involved deferring to another minister's opinion, and reliance on this policy amounted to unlawful surrendering of discretion.[28]

Both cases have been relied on in New Zealand, although not in judicial review of joint ministerial decisions.[29] However, these cases might underpin an analogy between fettering discretion through over-reliance on policies, and fettering discretion through over-reliance on the policies or opinions of another minister.

2.4 Requests under the Official Information Act 1982

MOC and MOF released information about population management plans under the OIA. MOC also released information on the proposal to introduce joint decision-making on access to Crown land for mining. MOF released an advice paper on the Tawharanui Marine Reserve Application, and two briefing papers about a proposal for overseas investment in fishing quota.

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[25] *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2006] NZAR 265 (HC); *Solid Energy New Zealand Ltd v Minister of Energy* [2009] NZRMA 145 (HC).
[26] *Save Happy Valley Coalition Inc v Minister of Conservation* HC Auckland CIV-2006-485-1634, 6 December 2006.
[27] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL) at 7.
[28] *H Lavender and Son Ltd v Minister of Housing and Local Government* [1970] 3 All ER 871 (QB), at 6.
[29] *Aviation Industry Association of New Zealand (Inc) v Civil Aviation Authority of New Zealand* HC Wellington CP289/00, 24 August 2001; *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA); *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC); *Legal Services Agency v Sweeney* (2005) 17 PRNZ 767 (HC); *Legal Services Agency v Sylva* [2009] 1 NZLR 279 (HC); *Practical Shooting Institute (New Zealand) Inc v Commissioner of Police* [1992] 1 NZLR 709 (HC); *SmithKline Beecham (NZ) Ltd v Minister of Health* [1992] NZAR 357 (HC); *Walsh v Pharmaceutical Management Agency ("Pharmac")* [2010] NZAR 101 (HC); *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA).

MER asked for the request to be directed more specifically to particular mining permits, then stated that MER had received no advice about joint decision-making on those permits.[30] The Overseas Investment Office declined to release any information, relying on s 9(2)(h) of the OIA, which provides that information can be withheld to maintain legal professional privilege.[31]

The statements in *CRA3 Industry Association Inc v Minister of Fisheries*[32] about concurrence (see Section 4.1) appear to have correctly flowed through to government departments advising their respective ministers. Information released by MOC and MOF indicated that concurrence was perceived as a separate and independent decision. However, the information released about population management plans revealed disagreement over whether concurrence is a desirable process.

Population management plans are a tool for managing threatened marine species. They allow MOC to set maximum allowable levels of fishing-related mortality for particular species, with MOF's concurrence.[33] Once a plan is created, MOF must ensure that the mortality level is not exceeded. But if no plan exists, MOF can set mortality limits.[34] So the effect of concurrence is that MOF can retain the power to set mortality limits, by refusing to concur with limits proposed by MOC.

To date, no population management plans have been created. The Department of Conservation ("DOC") is currently reviewing the creation process to make it simpler and more efficient. Two proposals were made. First, the process was described as unnecessarily complex, and DOC proposed taking a simpler approach to developing statutory documents such as position papers.

[30] Email from Hannah Swinton, Policy Analyst, Fuels & Crown Resources, Ministry of Economic Development to Heidi Baillie regarding a request made under the Official Information Act 1982 to the Minister of Energy and Resources (30 May 2011); Letter from Carolyn van Leuven, Manager, Fuels & Crown Resources, Ministry of Economic Development to Heidi Baillie regarding a request made under the Official Information Act 1982 to the Minister of Energy and Resources (19 July 2011).
[31] Letter from Peter Hill, Research and Support Officer, Overseas Investment Office to Heidi Baillie regarding a request made under the Official Information Act 1982 to the Overseas Investment Office (4 June 2011).
[32] *CRA3 Industry Association Inc v Minister of Fisheries,* above n 22.
[33] Marine Mammals Protection Act 1978, s 3H; Wildlife Act 1953, s 14I.
[34] Fisheries Act 1996, s 15.

Second, as part of the proposal to create a simpler and more efficient process, DOC suggested replacing concurrence with joint decisions by MOC and MOF on whether to approve population management plans. DOC proposed two options: either the Ministers could make decisions on the whole plan, or MOF could decide if impacts on fishing were undue, with MOC deciding whether the plan would achieve the recovery goal for a particular species.[35]

These proposals suggest that DOC perceives concurrence as a complicated and inefficient process, and therefore an impediment to the creation of population management plans. Conversely, information released about the population management plan review by the Ministry of Fisheries ("MFish") showed a desire to retain concurrence, which was viewed as the only way of adequately reflecting fishing interests.[36] MFish was concerned that if DOC acquired sole responsibility for setting mortality limits, it would set more conservative limits than MOF, thus reducing revenues from high-value fisheries.[37] Nothing in the information released suggests that MFish perceives concurrence as overly complex or inefficient.[38]

Information released by MOC on the proposal to introduce joint decision-making in respect of access to Crown land for mining revealed significant concerns about other joint decision-making provisions.[39] A briefing paper from DOC to MOC[40] stated that involving an

[35] Email from Jane McKessar to Gavin Rodley, providing Minister of Conservation's office with "Copy of Consultation Draft for Population Management Plan Review" (20 August 2010) (Obtained under Official Information Act 1982 Request to the Minister of Conservation) at 1-3.
[36] Briefing paper to the Minister of Fisheries "Population Management Plan Review" (30 June 2010) HO759 (Obtained under Official Information Act 1982 Request to the Minister of Fisheries) at 2.
[37] Ibid, at 7.
[38] Materials obtained under Official Information Act 1982 Request to the Minister of Fisheries: Agenda Item "Precis for Oral Item on Population Management Plan Legislation Review", covered by Jonathan Rudge at Ministry of Fisheries Officials Weekly Briefing (28 June 2010); Agenda Item "Precis on Stakeholder Consultation on Population Management Plan Proposals, Agenda Item No. B2", covered by Susan Jones (23 August 2010) HO759; Briefing paper to the Minister of Fisheries "A Population Management Plan (PMP) for the New Zealand Sea Lion" (27 July 2006) MR177/S7478; Briefing paper to the Minister of Fisheries "Population Management Plan Review" (30 June 2010) HO759; Briefing paper to the Minister of Fisheries "Population Management Plan Review" (19 March 2010) HO655.
[39] Materials obtained under Official Information Act 1982 Request to the Minister of Conservation: Briefing from the Department of Conservation to the Minister of Conservation "Review of Schedule 4 Crown Minerals Act: Proposed Public Discussion Document - Revised Paper" (23 February 2010) MSU reference 10-C-0044; Briefing from the Department of Conservation to the Minister of Conservation "Review of Schedule 4 Crown Minerals Act: Proposed Public Discussion Document" (8 February 2010) MSU reference 10-C-0023; Email from Jim Nicolson to Michael Gee, providing Minister of Conservation's office with "Additional Material for Possible Use in a Cabinet Paper Regarding the Review of Schedule 4 of the Crown Minerals Act" (26 October 2010); Email from Jim Nicolson to Daniel Skinner, providing Minister of Conservation's office with "Additional Material for Possible Use in a Cabinet Paper Regarding the Review of Schedule 4 of the Crown Minerals Act" (18 June 2010, 4:23pm); Email from Jim Nicolson to Daniel Skinner, providing Minister of Conservation's office with "Material for Possible Use in a Cabinet Paper Regarding the Review of Schedule 4 of the Crown Minerals Act" (18 June 2010, 2:37pm); Speaking points for the Minister of Conservation when attending a Cabinet Economic Growth and Infrastructure Committee (EGI) meeting "Release of a Discussion

additional minister in mining access decisions "could introduce legal and procedural problems", unless the two Ministers had "separate processes and criteria." Increased costs and delays were anticipated due to "an additional consideration process and potentially concurrence". DOC also considered that the public would be likely to view the proposal as compromising MOC's independence.[41]

The briefing paper identified numerous problems arising from the involvement of additional ministers in other statutes. Particular statutory provisions were not cited, but it seems likely that DOC was referring to processes like the creation of marine mammal sanctuaries and marine reserves. Problems included:[42]

> …the primary Minister not fully reflecting the concerns of a secondary Minister…conflicting or inefficient conditions; unclear accountabilities for enforcement or poor outcomes; duplicated analysis work; additional costs and delays for the applicant; and perceptions by the community that the decisions did not fully reflect some values.

Emails from a DOC official to MOC identified additional problems flowing from joint decision-making, and stated that DOC's preference was for MOC to remain the sole decision-maker.[43] One issue was that joint decision-making would create uncertainty regarding "which Minister was the lead". DOC considered that since decisions would be in relation to public conservation land, MOC should take the lead. Two further problems were uncertainty over what would happen if the Ministers could not agree on an application, and the additional complexity of running joint processes.[44]

Document on the Stocktake of Schedule 4 of the Crown Minerals Act 1991" (24 February 2010) prepared by Jim Nicolson and Michael Gee.

[40] Briefing from the Department of Conservation to the Minister of Conservation "Review of Schedule 4 Crown Minerals Act: Proposed Public Discussion Document - Revised Paper" (23 February 2010) MSU reference 10-C-0044 (Obtained under Official Information Act 1982 Request to the Minister of Conservation).

[41] Ibid, at 6.

[42] Ibid.

[43] Emails obtained under Official Information Act 1982 Request to the Minister of Conservation: Email from Jim Nicolson to Michael Gee, providing Minister of Conservation's office with "Additional Material for Possible Use in a Cabinet Paper Regarding the Review of Schedule 4 of the Crown Minerals Act" (26 October 2010); Email from Jim Nicolson to Daniel Skinner, providing Minister of Conservation's office with "Additional Material for Possible Use in a Cabinet Paper Regarding the Review of Schedule 4 of the Crown Minerals Act" (18 June 2010, 4:23pm); Email from Jim Nicolson to Daniel Skinner, providing Minister of Conservation's office with "Material for Possible Use in a Cabinet Paper Regarding the Review of Schedule 4 of the Crown Minerals Act" (18 June 2010, 2:37pm).

[44] Email from Jim Nicolson to Michael Gee, providing Minister of Conservation's office with "Additional Material for Possible Use in a Cabinet Paper Regarding the Review of Schedule 4 of the Crown Minerals Act" (26 October 2010) (Obtained under Official Information Act 1982 Request to the Minister of Conservation) at 1.

Speaking points prepared for MOC's attendance at a Cabinet Committee meeting highlighted other issues with joint decision-making. First, the process could create tensions by "the introduction of another Minister whose mandate is derived from different legislation". Second, it could "create an incentive or opportunity for applicants to lobby different Ministers and agencies."[45]

2.5 Further issues to explore

Overall, the research indicated that joint ministerial decision-making is a grey area of New Zealand law. Although there are many examples of statutory provisions requiring joint ministerial decisions, few have been litigated. Relevant cases were mainly in an environmental law context, possibly because of tensions between the conservation portfolio, with its focus on preserving land and resources, and the fisheries and mineral use portfolios, with their focus on utilising resources.

As to how judicial review would operate for joint ministerial decisions, the judicial approach to the meaning of concurrence was relatively clear (see Section 4.1). But there were too few cases on all types of joint ministerial decisions to enable any conclusions about whether the presence of an additional minister has made it harder for applicants to succeed on judicial review in the past. It was unclear whether ministers making joint decisions are less legally accountable than ministers making decisions alone.

However, the information released under the OIA highlighted numerous problems with joint decision-making. These problems are likely to become even more controversial after the Crown Minerals Act 1991 is amended. Therefore, the remainder of this paper takes a speculative approach, focusing on the challenges that are likely to face applicants seeking judicial review of joint ministerial decisions.

[45] Speaking points for the Minister of Conservation when attending a Cabinet Economic Growth and Infrastructure Committee (EGI) meeting "Release of a Discussion Document on the Stocktake of Schedule 4 of the Crown Minerals Act 1991" (24 February 2010) prepared by Jim Nicolson and Michael Gee (Obtained under Official Information Act 1982 Request to the Minister of Conservation) at 2.

Chapter Three: Judicial Review of All Types of Joint Decisions

3.1 Joint ministerial decisions on access to Crown land for mining

Drafts of the proposed amendments to the Crown Minerals Act 1991 are not yet available, so it is uncertain whether the joint decision by MER and the landholding minister will involve concurrence or equal participation. However, there will be similarities with the legislative scheme regarding acts in respect of wildlife (see Section 2.2). Applicants seeking access to Crown land for mining will already hold a mining permit. But applicants will then need consent from MER and the landholding minister to access Crown land, before the mining permit can be used.

The language of the Cabinet Paper points to an equal participation decision on access to Crown land. Terms such as "agreement", "concurrence" and "consent" are not used, and there is no indication of separate roles for each Minister. Rather, Cabinet recommends that:[46]

> …the process for approval of mineral-related access arrangements over Crown land be amended so that approvals are jointly decided on by the landholding minister and the Minister of Energy and Resources, and take into account criteria relating to the economic, mineral and national significance of the proposal to access Crown land.

Concurrence also seems unlikely because MOC currently has sole responsibility for applications seeking access to conservation land. Changing MOC's role to concurrence would make little practical difference since the concurring minister effectively has the upper hand. Conversely, if concurrence by MER is envisaged, some discussion of this could have been expected in the Cabinet Paper.

Significantly, Cabinet rejected the options of amending the matters considered by the landholding minister, or requiring the landholding minister to have regard to the views of MER. Cabinet considered that those options did not provide "a balanced consideration of

[46] Ministry of Economic Development and Department of Conservation *Cabinet Paper,* above n 3, at 2.

nationally significant mineral and economic potential alongside the landholder's own interests".[47] This suggests that MOC is unlikely to be given a concurrence role.

Regardless of which model of joint decision-making is chosen, potential applicants will face other hurdles common to most judicial review cases, such as justiciability, obtaining reasons, identifying reviewable decisions, and obtaining meaningful relief. Section 3.2 explores whether the presence of an additional minister makes these common issues more difficult.

3.2 Common issues

(a) Standing

Standing is unlikely to pose significant difficulties. If access to Crown land was denied to a mining permit holder, that person or body would have standing because the decision would affect their ability to use the permit. Environmental groups seeking judicial review of joint decisions granting access to permit holders would probably be national organisations, since these are most likely to have the necessary financial resources. A licence holder might argue that such a group lacked standing because many members were not directly affected. But the courts would probably find that environmental groups have standing, provided they have "an honest interest in a public issue".[48]

Guidance on when standing may be denied is found in *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries,*[49] where the High Court refused to allow the Environmental Defence Society ("EDS") to join judicial review proceedings against decisions by MOF. EDS argued it had a significant interest because it was concerned with environmental management policy, and that its presence would assist the Court.[50] MacKenzie J held that EDS's presence was unnecessary because MOF could defend the information

[47] Ministry of Economic Development *Discussion Paper,* above n 1, at 18.
[48] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 209.
[49] *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* (2009) 19 PRNZ 595 (HC).
[50] Ibid, at [4]-[5].

underpinning his decisions.[51] Further, EDS had not participated in public consultation on the management plan containing the challenged decisions.[52]

This case demonstrates that applicants are more likely to achieve standing where they are involved with the issue from the outset, and can provide evidence that other parties would be unlikely to offer. However, the presence of additional decision-making ministers does not affect whether applicants meet these criteria. If an applicant was involved with processes run by one minister in the leadup to concurrence by another minister, the applicant would still have standing to challenge the concurrence decision, because it would be related to the preliminary processes.

(b) Justiciability and threshold of review

The involvement of additional ministers is unlikely to be an outright bar to judicial review. But it will probably raise the threshold of review, making it harder for applicants to succeed.

Despite the high status of ministers, the courts are unlikely to find that a decision is not reviewable purely because additional ministers are involved in a decision. Ministers do have higher status than other public officials, but ministers differ from the Executive Council, which is "at the apex of the governmental structure, necessarily dealing with major issues in a somewhat broad way".[53] Rather, joint decision-making ministers must deal with specific details of proposals or applications.

However, the courts will probably view the involvement of additional ministers as a signal that a decision involves competing policies. Ministers are likely to approach the decision from different policy standpoints. These competing policies may not necessarily involve matters of national interest or other high policy issues. Competition between policies may arise simply because ministers start from different positions based on their own portfolios.

[51] Ibid, at [11]-[12].
[52] Ibid, at [13].
[53] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 177.

Parliament presumably intends joint decision-making ministers to draw on their own expertise. For example, in *Talleys Fisheries Ltd v Cullen* ("*Talleys*")[54] a statute requiring joint decision-making on overseas investment in fishing quota was viewed as allowing the Ministers to express "different political philosophies." Regarding joint decisions on access to Crown land for mining, Cabinet rejected the option of requiring the landholding minister to have regard to mineral and economic objectives, preferring instead to add MER as a joint decision-maker because that Minister is expected to give more weight to those objectives.[55] Since ministers appear to be viewed as advocates for different perspectives,[56] then Parliament must logically intend joint decision-making ministers to arrive at a compromise between their competing policy positions.

Some policy contests will also involve matters of traditional high policy, which the courts are generally reluctant to review. The Court of Appeal has observed that "the Courts recognise that they should not trespass into the legitimate policy sphere of Ministers."[57] Similarly, the High Court has commented that courts are reluctant to examine areas of high policy where the government is balancing social policies against other demands for national services.[58]

Nevertheless, there are indications that the courts will undertake judicial review even in the context of high policy. In *Hamilton City Council v Waikato Electricity Authority* ("*Hamilton City Council*")[59] the High Court observed that while socio-economic policies are the sphere of government, the courts can still take "a genuinely hard look at the processes actually adopted".[60] The High Court refused to find that the Minister of Energy's decision to approve a share allocation plan in an electricity supply company was non-justiciable. The decision involved community assets and it was considered untenable to put these beyond the reach of judicial review, even though national energy policy was involved.[61]

Against this background, the courts will probably adopt a "super-*Wednesbury*" test for review of joint ministerial decisions; that is, the courts will only intervene if the decision is so

[54] *Talleys Fisheries Ltd v Cullen,* above n 24, at 42.
[55] Ministry of Economic Development and Department of Conservation *Cabinet Paper*, above n 3, at 8, 18.
[56] *CRA3 Industry Association Inc v Minister of Fisheries,* above n 22, at [29].
[57] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 23.
[58] *SmithKline Beecham (NZ) Ltd v Minister of Health* [1992] NZAR 357 (HC) at 20-21.
[59] *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC).
[60] Ibid, at 5.
[61] Ibid, at 71-72.

absurd, outrageous or perverse that no reasonable ministers could make it.[62] This test would also be appropriate for decisions involving large amounts of policy that was not high policy, due to the weighing and compromising process inherent in such decisions.

Applicants could argue for a lower threshold of review, relying on the observation by Lord Cooke of Thorndon in *R v Secretary of State for the Home Department, ex parte Daly*[63] that *Wednesbury* was "an unfortunately retrogressive decision" because its strict test means that decisions will only be overturned for extreme errors. Lord Cooke commented that the law may not be satisfied "merely by a finding that the decision...is not capricious or absurd."[64] But on balance, New Zealand courts will probably follow the conventional *Wednesbury* approach, as occurred in *Wellington City Council v Woolworths New Zealand Ltd* ("*Woolworths*").[65]

In *Woolworths* the issue was whether the council made an unreasonable decision in setting rates. The Court of Appeal adopted the traditional *Wednesbury* test, partly because there were no detailed statutory criteria and the decision was viewed as more appropriate for elected representatives than the courts.[66] Access to Crown land for mining will differ because Cabinet intends to provide criteria such as the "economic, mineral and national significance" of a proposal.[67] But since these criteria are so broad, and the involvement of additional ministers indicates that additional weighing and balancing is required, the courts seem likely to prefer the conservative super-*Wednesbury* test.

Therefore, joint ministerial decisions may often be considered reasonable, even when the evidence is contested, because the threshold for unreasonableness is so high. The super-*Wednesbury* test might also be used in reviewing a policy-based decision of a single minister. But for joint decisions, this strict test will probably be the default position. Consequently, applicants are more likely to fail on judicial review.

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[62] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; Joseph *Constitutional and Administrative Law in New Zealand,* above n 10, at 933-934; *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) at [70].
[63] *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26.
[64] Ibid, at [32].
[65] *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 537 (CA).
[66] Ibid, at 545, 552.
[67] Ministry of Economic Development and Department of Conservation *Cabinet Paper,* above n 3, at 2.

(c) Right to reasons

Applicants will face more barriers to obtaining the reasons underpinning joint ministerial decisions, compared to those seeking reasons from a single minister. Without reasons, applicants will have problems identifying grounds of review (discussed in detail in Chapters Four and Five). A lack of reasons will obscure interactions between ministers, especially in equal participation decisions, making it harder to determine whether all ministers discharged their responsibilities.

The first hurdle is that ministers are not always obliged to give reasons. *Talleys*[68] held that the relevant Ministers need not give reasons for granting an application by an overseas company to hold fishing quota. The rationale for this finding was that there were no appeal rights, no other "parties" (the plaintiff was another fishing company), the decision was in favour of the application so the applicant was unlikely to challenge it, and the OIA provided an adequate alternative route for obtaining information.[69]

The lack of a duty to give reasons was reinforced by the broad statutory criteria, which contained "significant policy issues properly the domain of Ministers", including national interest. The statute was viewed as allowing "different political philosophies about overseas investment to be legitimately expressed" by the Ministers. Finally, both Ministers had provided affidavits showing their reasons for granting the application.[70]

Joint decision-making ministers could possibly rely on *Talleys* to justify withholding reasons. Many ministerial decisions involve significant policy matters, since Parliament is unlikely to burden ministers with decisions that could be made appropriately at a local level.

But the reasoning in *Talleys* is unconvincing. Arguably, if Parliament intends ministers to express different political philosophies, then Parliament probably envisages that this expression will be publicly available. Applicants could also distinguish *Talleys* because the joint decision-making process was not challenged. The courts might accept that where the

[68] *Talleys Fisheries Ltd v Cullen,* above n 24.
[69] Ibid, at 42.
[70] Ibid.

lawfulness of a minister's contribution to a joint decision is challenged, reasons are necessary to enable the courts to examine the joint decision-making process.

Applicants could rely on observations from the Court of Appeal that giving reasons helps to maintain public confidence in the justice system, and allows courts of supervisory jurisdiction to assess the decision.[71] In *Fiordland Venison Ltd v Minister of Agriculture & Fisheries* ("*Fiordland Venison*")[72] where the Minister declined a licence application without giving reasons, the Court of Appeal inferred those reasons from the evidence, commenting that cases where reasons can justifiably be withheld will be "exceptional". *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*[73] observed that "Ministerial candour with the courts about their policy" is the constitutional corollary of the courts avoiding the "legitimate policy sphere of Ministers". Joseph interprets this comment as showing that ministers have a special responsibility to give reasons.[74] Government decision-makers are also encouraged to provide reasons.[75]

Nevertheless, there is no general rule that decision-makers must give reasons; everything depends on the circumstances.[76] The courts might accept an argument that reasons are required where the joint decision-making process itself is challenged, but as yet, this is a grey area of law. Therefore, a lack of reasons is likely to be the first major hurdle for applicants seeking judicial review of joint ministerial decisions.

(d) The Official Information Act 1982

The presence of additional decision-making ministers seems likely to justify withholding information under the OIA. The view in *Talleys* that the OIA provides an adequate alternative is difficult to reconcile with the statutory criteria.

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[71] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [79]-[80]; *Singh v Chief Executive, Department of Labour* [1999] NZAR 258 (CA) at 5-6.
[72] *Fiordland Venison Ltd v Minister of Agriculture & Fisheries* [1978] 2 NZLR 341 (CA) at 346.
[73] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries,* above n 57, at 23.
[74] Joseph *Constitutional and Administrative Law in New Zealand,* above n 10, at 986.
[75] Crown Law Office *The Judge over your Shoulder: a guide to judicial review of administrative decisions* (2005) at 29.
[76] *Waimakariri Employment Park Ltd v Waimakariri District Council* HC Wellington CIV-2003-485-1226, 5 February 2004 at [42]-[47].

Applicants seeking reasons would probably fall under s 23 of the OIA, whereby a person may be entitled to reasons if the decision affects that person in their personal capacity. The Office of the Ombudsmen interprets s 23 as requiring "a particular interest in the decision…that is different from that of the general public."[77] Taylor equates "affect" with standing,[78] which is unlikely to present any additional difficulties for those challenging joint ministerial decisions.

But ministers could still withhold information under s 9, on the basis that release would detrimentally affect the confidentiality of advice tendered by ministers, or hinder the free and frank expression of opinions between ministers.[79] A single minister might also rely on s 9, for example if there had been consultation with other ministers. However, where there is a joint ministerial decision, s 9 enables ministers to withhold virtually all the relevant information. Where ministers wish to conceal disagreements, the OIA will probably be a significant barrier to applicants seeking information to underpin a judicial review challenge.

(e) Identifying reviewable decisions

Joint ministerial decision-making is likely to involve high-profile matters. These will probably attract media interest, such that ministers' preliminary views are reported as if a particular decision is imminent. But such reports are unlikely to be evidence of a reviewable decision.

In *Wellington International Airport Ltd v Commerce Commission*,[80] the plaintiff was consulted in accordance with the relevant statute, and then argued it was entitled to further consultation. The High Court held that the Commerce Commission took only administrative steps; no reviewable decision was made, so judicial review was premature. Further, "good public administration argues against the Court intervening in the deliberative stage of an inquiry such as this."[81]

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[77] Office of the Ombudsmen *Official Information: A Guide For People Who Want Information From Central And Local Government* Office of the Ombudsmen at 8 <www.ombudsmen.govt.nz> Accessed 28 July 2011.
[78] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 268.
[79] Official Information Act 1982, ss 9(2)(f)(iv), 9(2)(g)(i).
[80] *Wellington International Airport Ltd v Commerce Commission* (2002) 10 TCLR 460 (HC).
[81] Ibid, at 13-15.

Similarly, in *Hayes v Logan*[82] the High Court held that a police application to the Liquor Licensing Authority to cancel the plaintiff's certificate was only a preliminary step.[83] Miller J cited numerous cases showing reluctance to grant judicial review of procedural steps before a decision, but noted that judicial review of the police decision would have been available in "exceptional circumstances".[84] If an applicant challenging a joint ministerial decision had suffered a grave injustice and had a strong case, the courts might find that a reviewable decision rather than a preliminary step had occurred.

However, in most situations applicants will probably have to wait until a clearly identifiable decision is made. With equal participation decisions, the courts will almost certainly refuse to find that a decision is made until the ministers announce it. With some concurrence provisions, applicants may be able to challenge the first minister's actions if the drafting makes it clear that there is a separate decision before concurrence.[85] In such situations, two judicial review applications would be possible.

But concurrence provisions may also be drafted so that steps taken by one minister towards the decision have no effect until another minister concurs.[86] The courts might perceive the first minister as taking only administrative steps. Whether applicants can challenge the acts of both ministers will probably turn on the exact wording of the section.

Applicants could argue for a less technical approach to judicial review, relying on *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd,*[87] which held that judicial review is "judicial invention to secure that decisions are made by the executive or by a public body according to law even if the decision does not otherwise involve an actionable wrong." Support also comes from *Royal Australasian College of Surgeons v Phipps,*[88] which observed

[82] *Hayes v Logan* [2005] NZAR 150 (HC).
[83] Ibid, at [50].
[84] Ibid, at [51]-[61].
[85] For example, s 5(6) of the Marine Reserves Act 1971 requires the Minister of Conservation to "decide" whether to uphold objections to the creation of a marine reserve, and s 5(7) makes that decision "final". If the Minister of Conservation decides that no objections should be upheld and is satisfied of various other matters, s 5(9) then provides that the Minister of Conservation shall recommend the making of an Order in Council to the Governor-General, if the Ministers of Transport and Fisheries concur.
[86] For example, the effect of s 22 of the Marine Mammals Protection Act 1978 is that in order to declare a marine mammal sanctuary, the Minister of Conservation must first obtain the consent of any other minister with control over those waters, since the consent must be notified concurrently with the declaration.
[87] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 3.
[88] *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA).

that the courts are increasingly willing to review exercises of public power, "however their origins and the persons or bodies exercising them might be characterised".[89]

The courts might take an expansive approach and review decisions of a non-concurring minister, especially for controversial applications with significant public interest. But applicants cannot be certain of this, since there is no case law involving challenges to a decision made before concurrence. Distinguishing procedural steps from reviewable decisions made before concurrence thus presents another hurdle for applicants. If proceedings are brought too soon, applicants run the risk of extra expense, which may affect their ability to challenge the later reviewable decision.

(f) Relief

Since relief on judicial review is discretionary, applicants might fail to obtain meaningful relief even where a decision is flawed. Remedies essentially depend on what the court considers fair and reasonable.[90] A common remedy is to refer the decision back to the decision-maker, to be made again in accordance with the law as stated by the reviewing court.[91]

Chiu v Minister of Immigration[92] held that "the Courts will be slow to deny a remedy" on the basis that the decision would be the same even if lawfully remade. But joint ministerial decisions are likely to require considerable negotiation, such that the ministers are strongly committed to their original decision. Therefore, applicants' chances of obtaining a different decision through this remedy appear smaller than if a decision was referred back to a single minister.

Sometimes the courts will make an order effectively requiring a particular result, but the availability of this remedy appears to depend on the relevant legislation. In *Fiordland Venison*[93] the Court of Appeal cited *Padfield v Minister of Agriculture* [1968] AC 997, which

[89] Ibid, at 15.
[90] Crown Law Office *The Judge over your Shoulder: a guide to judicial review of administrative decisions,* above n 75, at 5.
[91] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 132-138.
[92] *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 15-16.
[93] *Fiordland Venison Ltd v Minister of Agriculture & Fisheries,* above n 72, at 350-351.

held that where a statute "expressly or impliedly limits the reasons for which an exercise of the power can be refused and on the particular facts the considerations all point one way", then the decision-maker has a legal duty to exercise a statutory power in a particular way. The relevant statute in *Fiordland Venison* required the Minister to grant a licence if he was satisfied of certain conditions. The Court of Appeal found no evidence on which a reasonable Minister could have determined he was not satisfied, and declared that the applicant was entitled to a licence.[94]

In *Haronga v Waitangi Tribunal,*[95] a majority of the Supreme Court required the Waitangi Tribunal to accord urgency to the applicant's hearing, although the Tribunal still had a choice about whether to grant a remedy. William Young J dissented, observing that despite *Fiordland Venison,* the courts do not normally "exercise (directly or indirectly) the statutory power of decision which is being reviewed."[96]

Cabinet envisages broad criteria to guide decisions on access to Crown land for mining, and the addition of a second decision-making minister seems to indicate that Parliament expects ministers to weigh competing policy considerations (see Section 3.2(b)). Therefore, the courts seem unlikely to find that the evidence all pointed in the opposite direction from the ministers' decision. Even if strong evidence pointed against the decision, a court would probably prefer the conservative remedy of referring the decision back, rather than risking the appearance of substituting its own judgment for that of the ministers.

Where there is a clear mistake of fact, the chances of obtaining a different decision on reconsideration may increase. A mistake of fact by a non-concurring minister does not appear to be cured by concurrence. In *Tamaki Reserve Protection Trust Inc v Minister of Conservation* ("*Tamaki Reserve*"),[97] MOC declared that an area of land was not a reserve. This was a prerequisite for the Minister of Lands' declaration, setting the land apart for defence purposes. The High Court found that the legal status of the land was a relevant factor which MOC failed to take into account, because MOC was provided with inadequate and

[94] Ibid, at 352-353.
[95] *Haronga v Waitangi Tribunal* [2011] NZSC 53 at [78].
[96] Ibid, at [112]-[113].
[97] *Tamaki Reserve Protection Trust Inc v Minister of Conservation* HC Auckland CP600/97, M1915/97, 12 March 1999.

misleading information about it.[98] Consequently, the Minister of Lands' declaration was also invalidated.[99] Although *Tamaki Reserve* was not framed as a mistake of fact case, it could have been, since the legal status of the land was a fact about which MOC was wrongly informed.

Mistake of fact is an unsettled ground at appellate level in New Zealand,[100] although the High Court has accepted it.[101] *Northern Inshore Fisheries Company Ltd v Minister of Fisheries* held that the decision-making process "will have miscarried where mistake of fact is pivotal to the decision to be made".[102] There must be a mistake, "not simply a disagreement between two or more possible views."[103] Where additional ministers are involved in technical decisions, and each draws on their particular expertise, it may be harder for applicants to prove that there was a mistake of fact rather than a legitimate disagreement.

Applicants may have particular difficulty proving a pivotal mistake where one minister relied on another minister's expertise regarding a piece of mistaken evidence. If both ministers had expertise in that field, then the mistake could be pivotal. But if the mistake related to only one minister's expertise, and there was other convincing evidence, a court might find that the mistake was not pivotal. Further, mistakes seem less likely in joint ministerial decisions because any contentious evidence will probably be closely scrutinised.

3.3 General effects of joint ministerial decisions on legal accountability

Applicants challenging joint ministerial decisions face additional barriers on judicial review, compared to those challenging decisions of a single minister. The major barrier is that the courts are likely to adopt a super-*Wednesbury* test, because the involvement of additional ministers appears to be a signal from Parliament that such decisions involve weighing and balancing of competing policies. This strict test makes it harder for applicants to succeed on judicial review.

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[98] Ibid, at 24, 28-29.
[99] Ibid, at 31.
[100] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 132, 140, 149.
[101] *S v M* [2003] NZAR 727 (HC) at 63-64.
[102] *Northern Inshore Fisheries Company Ltd v Minister of Fisheries* HC Wellington CP235/01, 4 March 2002 at [48].
[103] Ibid, at [49].

Another hurdle for applicants is that ministers may prefer not to give reasons, in order to conceal areas of disagreement and negotiation. Ministers might rely on *Talleys* to argue that there is no duty to provide reasons. It is difficult to predict whether the courts would find that reasons are required when a joint decision-making process is directly challenged. But it seems likely that ministers will increasingly rely on s 9 of the OIA to justify withholding information, so applicants cannot rely on that route as an alternative to reasons.

Applicants may choose not to spend money on preliminary proceedings to try to obtain reasons, but rather, to save that money to challenge the substantive decision. Therefore, applicants trying to decide whether a particular decision is worth challenging may be doing so on very little information. Others may choose not to bring proceedings at all because of the risk of having costs awarded against them.

Identifying reviewable decisions may be problematic, particularly with concurrence decisions (see Section 4.3). A significant challenge for applicants seeking review of all types of joint ministerial decisions will be distinguishing between preliminary steps and reviewable decisions. Although this problem is not unique to joint ministerial decisions, it seems more likely to occur in that context, because of the drawn-out discussions and negotiations leading up to joint decisions.

Finally, even if applicants succeed, relief will probably involve referring the decision back to the ministers, which is likely to result in the same decision. Where a mistake of fact was shown, a different decision may result. But pivotal mistakes will be difficult to prove and may be less common in joint decisions where contentious evidence is closely examined.

These additional barriers confronting applicants for judicial review of joint ministerial decisions tend to reduce the legal accountability of ministers, by reducing applicants' chances of success, and discouraging some applicants from bringing proceedings at all.

Chapter Four: Judicial Review of Decisions Made By Concurrence

4.1 Meaning of concurrence in case law

This paper divides joint decision-making provisions into two basic models (see Section 2.2). The first model involves concurrence, where one minister typically carries out most of the steps leading up to a decision, but that decision can only be made if another minister concurs.

Concurrence is not defined in statutes containing the term, such as the Marine Mammals Protection Act 1978 and the Marine Reserves Act 1971. However, guidance is provided in *CRA3 Industry Association Inc v Minister of Fisheries* ("*CRA3*")[104] where the applicants unsuccessfully challenged MOF's concurrence in the creation of a marine reserve. The Court of Appeal cited the following observation of McGechan J in the High Court with approval:[105]

> …the requirement to "concur" assumes an intelligent appraisal by the Minister of Fisheries himself. It may be possible to "concur" blindly in some contexts. The essential and minimum meaning of "concur" is to "run with" or to "go along with" a decision; and in some circumstances that might be done as an act of faith. In this context, however, where the concurrence of the Minister of Transport and Minister of Fisheries is required as a safeguard for their particular interests, that is not contemplated. Parliament obviously expected the Ministers to give the questions on which concurrence was sought their own proper appraisal.

Ellis and Doogue JJ then commented:[106]

> We too agree that the Minister must turn his mind to the objection, make any enquiries he considers appropriate and make his own decision whether or not to agree with the decision of the Minister of Conservation. In so doing he is of course entitled to place reliance on the views of the Minister of Conservation, but should not accept them "blindly" especially where the aspect of the matter is one in which the Minister and his Department has expertise.

[104] *CRA3 Industry Association Inc v Minister of Fisheries,* above n 22.
[105] Ibid, at [15].
[106] Ibid, at [16].

Thomas J agreed, noting that the concurring minister must "reach his own independent decision".[107]

The Court of Appeal's statements make it clear that while the "intelligent appraisal" aspect of McGechan J's definition is accepted, blind concurrence is never possible. Concurrence requires a separate and independent inquiry. But it is unclear from *CRA3* how much reliance may be placed on another minister's views, without going so far that the reliance becomes blind.

There appears to be no other judicial guidance on the meaning of concurrence. As discussed in Section 2.2, the legislative scheme regarding acts in respect of wildlife is similar to concurrence in a practical sense. But although *Save Happy Valley Coalition Inc v Minister of Conservation*[108] provides guidance on how MOC and MER should interact, the courts would probably find that applicants challenging concurrence decisions cannot rely on that case, because s 71 of the Wildlife Act 1953 creates a process of equal participation. Both Ministers are simply required to give consent.

The High Court in *Save Happy Valley Coalition Inc v Minister of Conservation* did not rely on *CRA3,* which suggests that the decision-making processes in the respective legislative schemes are different. For both applicants and ministers, *CRA3* is therefore the most authoritative source on the meaning of concurrence.

4.2 Hypothetical scenarios in concurrence decisions

Since case law on concurrence is sparse, the remainder of this chapter takes a hypothetical approach. Three scenarios which may present difficulties for applicants are explored, to examine whether it is harder for applicants to succeed in judicial review of concurrence decisions by comparison with decisions of a single minister.

[107] Ibid, at [2].
[108] *Save Happy Valley Coalition Inc v Minister of Conservation,* above n 26.

(a) Blind reliance or rubber-stamping by concurring minister

One scenario may arise where concurrence was allegedly flawed because the concurring minister blindly relied on the other minister's decision, thus failing to decide independently.

Applicants would almost certainly rely on the ground of error of law, because the meaning of concurrence is relatively clearly set out in *CRA3* (see Section 4.1). But the courts may well tolerate a high degree of reliance, provided the evidence shows that the concurring minister independently turned his or her mind to the decision. The circumstances of each case, including the ministers' portfolios, will probably determine whether the ministers should act as advocates for different policy perspectives or rely on each other's expertise. The courts might accept very substantial reliance if one minister had technical expertise and there was little or no overlap between the ministers' portfolios.

Applicants could also rely on the ground of fettering discretion, arguing that blind reliance amounted to an unlawful surrendering of discretion to the non-concurring minister. However, an allegation of blind reliance would be no different from error of law in this context, because both grounds would require evidence that one minister failed to make an independent decision.

Blind concurrence could possibly be challenged as unreasonable, but this begs the question of why it was unreasonable. The answer is likely to be that the concurring minister relied too heavily on the other minister's decision, so there would be no difference between this ground and error of law. Further, the courts are likely to adopt a super-*Wednesbury* test for intervention in joint ministerial decisions (see Section 3.2(b)). Therefore, applicants would probably wish to avoid relying on unreasonableness since this high test is difficult to meet.

(b) Fettering discretion by relying on other minister's policies or opinions

A second scenario may arise where one minister allegedly fettered his or her decision by relying too heavily on the policies of another minister. This scenario involves deliberate rather than blind reliance.

A real-world example is MOC's decision to decline a proposal for a marine reserve in Akaroa Harbour because it would have an adverse effect on recreational fishing.[109] MOC is required to consider these effects under s 5(6)(d) of the Marine Reserves Act 1971, but applicants may consider that MOC declined the proposal because it was likely that MOF would refuse to concur. MOC's decision has not been challenged, so the scenario remains hypothetical.

Research undertaken for this paper found no New Zealand cases where fettering discretion was relied on to challenge joint ministerial decisions. The leading case from the United Kingdom is *H Lavender and Son Ltd v Minister of Housing and Local Government* ("*Lavender*"),[110] accepted in New Zealand by *Hamilton City Council.*[111] In *Lavender* there was no concurrence requirement, but the Minister of Housing and Local Government was found to have surrendered his discretion, by adopting a self-created policy of releasing particular land for mineral working only if the Minister of Agriculture, Fisheries and Food did not oppose it.[112]

In *Hamilton City Council,* the Council challenged a share allocation plan approved by the Minister of Energy. The Council argued that the Waikato Electricity Authority, which presented the plan to the Minister, was biased.[113] The High Court observed that predetermination can shade into surrendering discretion, but stated that the rules against bias and surrendering discretion do not prevent decision-makers from consulting with others and taking advice. Affidavits from the Authority's members disclaimed any predetermination, and the High Court found that this ground was not made out.[114]

The New Zealand courts would probably accept that fettering discretion can be used to challenge joint ministerial decisions, since *Lavender* has been accepted. Although *Hamilton City Council* is not a concurrence case, it is indirectly relevant since it considers fettering discretion. But it highlights a difficulty for applicants, in that relatively little evidence will be required to show that a concurring minister did not fetter his or her discretion by over-reliance on another minister's policies or by having a closed mind.

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[109] Minister of Conservation "Decline of Proposal for Akaroa Marine Reserve" (press release, 20 August 2010).
[110] *H Lavender and Son Ltd v Minister of Housing and Local Government,* above n 28.
[111] *Hamilton City Council v Waikato Electricity Authority,* above n 59, at 73.
[112] *H Lavender and Son Ltd v Minister of Housing and Local Government,* above n 28, at 6.
[113] *Hamilton City Council v Waikato Electricity Authority,* above n 59, at 2-4.
[114] Ibid, at 76-80.

Applicants could also draw an analogy with a well-known line of cases on fettering discretion by over-rigid adherence to policies. The leading case from the United Kingdom is *British Oxygen Co Ltd v Minister of Technology* ("*British Oxygen*"),[115] which upheld the proposition that anyone exercising a statutory discretion must not shut their ears to an application. Decision-makers may evolve policies, but must remain willing to listen.

British Oxygen has been followed in New Zealand. *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries*[116] found that decision-making power regarding permits to harvest cockles was unlawfully fettered, because the decision-makers treated their own policy as mandatory. *Chiu v Minister of Immigration*[117] held that a decision to decline a residence application was unlawful, because an official allowed a departmental manual to supplant his statutory discretion. Numerous High Court cases have held that decision-makers cannot rely on manuals or policies so heavily that their discretion is fettered.[118]

Applicants could draw an analogy between the situation where one decision-maker fetters his or her discretion through over-reliance on policies or manuals, and the situation where one minister fetters his or her discretion by over-reliance on the policies and opinions of another minister. The courts will probably accept this analogy, since the *British Oxygen* requirement that decision-makers should not close their ears to applications is consistent with the *CRA3* requirement that concurrence should not involve blind reliance. But the same problem arises as with error of law, in that the courts are likely to accept a high degree of reliance by one minister on another before finding that discretion has been fettered.

Alternatively, a challenge might be framed as taking irrelevant considerations into account. Applicants could try to argue that one minister should not have considered the policies of another minister. But since Parliament has chosen two or more ministers to make the same decision, it will be difficult to persuade the courts that one minister's policies were irrelevant, especially since *CRA3* makes it clear that some degree of reliance on another minister is

[115] *British Oxygen Co Ltd v Minister of Technology,* above n 27, at 7.
[116] *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [48]-[49].
[117] *Chiu v Minister of Immigration,* above n 92, at 11-12.
[118] *Aviation Industry Association of New Zealand (Inc) v Civil Aviation Authority of New Zealand* HC Wellington CP289/00, 24 August 2001; *Legal Services Agency v Sweeney* (2005) 17 PRNZ 767 (HC); *Legal Services Agency v Sylva* [2009] 1 NZLR 279 (HC); *Practical Shooting Institute (New Zealand) Inc v Commissioner of Police* [1992] 1 NZLR 709 (HC); *SmithKline Beecham (NZ) Ltd v Minister of Health* [1992] NZAR 357 (HC); *Walsh v Pharmaceutical Management Agency ("Pharmac")* [2010] NZAR 101 (HC).

possible (see Section 4.1). Further, *CREEDNZ Inc v Governor-General* ("*CREEDNZ*")[119] held that where the allegation is that an irrelevant consideration was taken into account, very little evidence will suffice for the decision-maker to prove that it was not.

(c) Decision not to proceed although concurrence was likely

A third scenario may arise where the non-concurring minister decided not to proceed with a decision (for example, the creation of a marine reserve), but strong evidence shows concurrence would have been given.

The main challenge would be obtaining meaningful relief. Applicants would first have to persuade the courts that the decision of the non-concurring minister not to proceed was flawed in some way. If a flaw was found, the most likely relief would be to refer the decision back to the non-concurring minister (see Section 3.2(f)). That minister might then arrive at the same decision by a different route.

Applicants could rely on *Fiordland Venison*[120] and argue firstly, that the only reasonable decision open on the evidence was to proceed with the activity and seek concurrence; and secondly, that the court should declare the activity can go ahead, since the evidence shows concurrence would have been given. But a court would probably be reluctant to grant such relief, since it comes close to substituting the court's decision for that of both ministers. The conservative approach would be to refer the decision back to the non-concurring minister, thus allowing both ministers to make independent decisions. Again, the eventual outcome for applicants could be the same decision not to proceed with the activity.

4.3 Effects of concurrence decisions on legal accountability

The key difficulty in challenging concurrence decisions is determining the boundary between permissible reliance on another minister's opinion, and blind reliance. Since no other cases on concurrence have considered this aspect of *CRA3,* it is unclear how much reliance will be too much. But it seems possible that in some circumstances, one minister could depend

[119] *CREEDNZ Inc v Governor-General,* above n 53, at 183.
[120] *Fiordland Venison Ltd v Minister of Agriculture & Fisheries,* above n 72.

heavily on other ministers without crossing the boundary into unlawful reliance. This creates significant uncertainty for applicants about their chances of success on judicial review.

Another difficulty facing applicants is that the courts are likely to set a relatively high threshold for intervention, regardless of which ground is used. In error of law, a high degree of reliance on the other minister will probably be acceptable. If unreasonableness is relied on, a super-*Wednesbury* test is likely.

The ground of fettering discretion is likely to be attractive to many applicants challenging concurrence decisions, because it directly targets the independence of each minister and the way the ministers interact. But very strong evidence will probably be required to convince the courts that a minister's discretion was fettered.

Another problem with concurrence decisions is deciding the point at which they can be challenged. Each minister's decision may be challenged if the drafting of the relevant statute clearly shows separate decisions before concurrence. Conversely, some statutes state that steps taken towards a decision have no legal effect until concurrence is given (see Section 3.2(e)).

But where a statute is unclear, applicants would face significant uncertainty about when to bring proceedings, especially if the decision-making process was very drawn out. There is a risk that the courts will find that the ministers' acts are only preliminary steps until concurrence is given or declined. Therefore, applicants may opt not to challenge pre-concurrence decisions that might actually be reviewable, because of the risk of wasting money that could be used to challenge clearly identifiable decisions later.

In summary, concurrence creates further barriers for applicants seeking judicial review of joint ministerial decisions, in addition to those discussed in Chapter Three. Joint decision-making ministers are still legally accountable, in the sense that their decisions can be judicially reviewed, but it will be harder for applicants to succeed.

Chapter Five: Judicial Review of Joint Decisions Made By Equal Participation

5.1 Guidance from case law

This chapter examines particular issues arising on judicial review of equal participation decisions, where all ministers take part in all the decision-making steps. For applicants, these issues would be additional to the matters discussed in Chapter Three. Applicants challenging equal participation decisions may also face some of the scenarios discussed in Chapter Four, such as rubber-stamping or fettering discretion through over-reliance on another minister's policies. Without the clear division of roles inherent in concurrence, these scenarios may be even harder to challenge.

The definition of concurrence in *CRA3* provides a natural starting point for judicial review of concurrence decisions, but there is no equivalent starting point for equal participation. Some guidance is provided in *Wellington International Airport Ltd v Air New Zealand* (*"Wellington Airport"*),[121] where the appellant unsuccessfully argued that the Minister of Finance failed to give individual attention to the joint decision by the Ministers of Finance and Transport about the value of the airport assets.

The Court of Appeal observed that the Minister of Finance had to exercise "informed personal judgment", but could also "place some reliance on the Minister of Transport as being the Minister primarily involved." The Ministers had had several discussions and significant memoranda were referred to both. The Minister of Finance's signatures of approval on the final report and list of values were taken as showing that the Minister "…understood them sufficiently to be satisfied…that the recommended value was a proper and appropriate one."[122]

Wellington Airport suggests that fettering discretion by over-reliance on another minister's judgment will be difficult to prove with equal participation decisions, for the same reason that

[121] *Wellington International Airport Ltd v Air New Zealand,* above n 14.
[122] Ibid, at 25.

it is difficult with concurrence. A relatively high degree of reliance is likely to be permitted, and possibly even more so with equal participation, where there is no clear division of roles.

Save Happy Valley Coalition Inc v Minister of Conservation ("*Save Happy Valley*")[123] arguably provides persuasive guidance on the proper relationship between ministers making equal participation decisions. This case followed an earlier decision holding that s 71 of the Wildlife Act 1953 required consent from both MOC and MER regarding Solid Energy's application to relocate snails.[124] The relevant legislative scheme creates an anomalous situation, similar to concurrence in terms of the practical outcome, but more like equal participation in terms of the decision-making process (see Sections 2.2 and 4.1). Concurrence is a linear process, requiring each minister in turn to make separate and independent decisions, whereas s 71 of the Wildlife Act 1953 only requires both Ministers to consent.

In *Save Happy Valley,* the applicant argued that a very strong degree of separation was required between the Ministers, but the High Court rejected the proposition that each Minister must make a separate and independent decision. Rather, "some balancing of competing considerations" is necessary and the relevant Ministers must "come together and agree on what is to happen." However, "each Minister must form an independent judgment as to whether to consent."[125]

Save Happy Valley makes it clear that where ministers are required to weigh and balance relevant statutes, the outcome will be difficult for applicants to challenge. The High Court observed that the applicant had to maintain a "fine line" between alleging that the Ministers took an incorrect approach to balancing the purposes of the two statutes, and "the well established proposition that weight is for the decision-maker."[126] It was for the Ministers to determine where the balance between the statutes lay, provided they did so in a reasonable manner. The exact balance would be a case-specific inquiry, and so would the question of which statutory purpose should prevail in the event of an "unremediable conflict".[127]

[123] *Save Happy Valley Coalition Inc v Minister of Conservation,* above n 26.
[124] *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Conservation* [2006] NZAR 265 (HC).
[125] *Save Happy Valley Coalition Inc v Minister of Conservation,* above n 26, at [10]-[16].
[126] Ibid, at [25].
[127] Ibid, at [31]-[32].

As with concurrence, case law on equal participation decisions is sparse. The remainder of this chapter explores five hypothetical scenarios that may present difficulties for applicants challenging equal participation decisions, and examines whether such decisions are harder to challenge than decisions of a single minister.

5.2 Hypothetical scenarios in equal participation decisions

(a) Failing to express an individual perspective

One scenario may arise where a statute allows all ministers to express different political philosophies, as in *Talleys,*[128] but although some ministers involved in the decision do so, one minister expresses no particular philosophical perspective. Applicants may allege that this minister did not do enough to make a decision in his or her own right.

A challenge could be framed under the head of unreasonableness. Applicants could argue that where a statute clearly envisages that each minister will approach a decision from a particular perspective, a reasonable minister could not fail to do so. But on the super-*Wednesbury* test, the courts would be unlikely to find that the minister's decision was perverse or absurd merely because he or she chose not to describe the philosophical perspective underpinning that decision.

Alternatively, applicants might argue that the minister failed to take an implied relevant consideration into account, being the requirement to consider the philosophical perspective on the statute which the minister's own portfolio and expertise points to. But *CREEDNZ* observed that it is hard to discharge the burden of proof for allegations that a relevant matter was not considered.[129] The need to express any particular philosophical perspective would probably be considered a matter for the minister's own judgement. The courts are unlikely to find that failing to describe a particular philosophy, in a situation where it was optional, is evidence that the minister failed to take a relevant consideration into account. Further, *Wellington Airport* indicates that relatively little participation in a decision is sufficient.

[128] *Talleys Fisheries Ltd v Cullen,* above n 24, at 42.
[129] *CREEDNZ Inc v Governor-General,* above n 53, at 184.

Applicants could argue that *Wellington Airport* can be distinguished because the Minister of Finance can naturally be expected to play a brief role of checking expenditure or other financial aspects of a decision, leaving the majority of the process to the minister whose portfolio covers the substantive issues. The interest of the Minister of Finance in the decision about valuation of airport assets is arguably limited to whether that valuation is in accordance with generally accepted financial principles. But where all joint decision-making ministers start from value-laden positions, applicants could argue that Parliament expects all those ministers to actively express those values in the decision. For example, MOC is seen as the guardian of the conservation estate,[130] whereas the Ministers of Energy and Fisheries both administer statutes which envisage the exploitation of natural resources.[131]

But the High Court in *Talleys* did not take the position that the Minister of Overseas Investment could be expected to have a more objective perspective than MOF. Rather, both Ministers were anticipated to have their own philosophical approach to overseas investment, yet neither was required to provide that approach by way of reasons. Applicants are therefore unlikely to persuade the courts to distinguish either *Wellington Airport* or *Talleys.* If one minister expresses no particular philosophy underpinning his or her decision, the courts will probably find that this is not evidence that the minister failed to make a lawful decision.

(b) Insufficient weight given to relevant statutory principles or other considerations

A second scenario may arise where the ministers have chosen to give no weight, or very little weight, to statutory provisions or other relevant considerations which appear highly relevant on their face. A challenge could be framed under error of law, alleging that the ministers misinterpreted relevant statutory provisions or failed to consider them altogether, thus failing to take relevant considerations into account. Such a decision might also be unreasonable.

The first difficulty for applicants is that very little evidence may suffice to show that all relevant considerations were taken into account. As noted, Cooke J in *CREEDNZ* observed that it is difficult to prove that relevant matters were not considered.[132] Richardson J in *CREEDNZ* observed that while the Ministers took "a more optimistic view" than the

[130] Parliamentary Commissioner for the Environment, above n 7, at 26.
[131] Crown Minerals Act 1991, s 12; Fisheries Act 1996, s 8.
[132] *CREEDNZ Inc v Governor-General,* above n 53, at 184.

plaintiff's experts about the economic implications of the proposed smelter, that was not a legal issue and did not amount to evidence that the ministers failed to take relevant considerations into account.[133]

Another difficulty is the well-established principle that "weight is for the decision-maker".[134] In *Save Happy Valley* the High Court observed that:[135]

> …where the balance lies between those Acts is a matter for the decision-maker subject to the usual constraints such as reasonableness. It is not necessarily a question of balancing the policies in the sense of compromise; in a given case appropriate conditions might allow both purposes to be fully realised. Where the balance lies is inevitably a case specific inquiry…

While the courts might intervene if a decision about relevant statutory principles and other considerations was unreasonable, the circumstances would have to be exceptional to meet the super-*Wednesbury* test.

The level of statutory detail seems unlikely to make any difference to the difficulties that this high test poses for applicants (see Section 2.1 and Appendix Two for descriptions of the statutory criteria in joint decision-making provisions located during the research process). Broadly worded statutory considerations would probably be interpreted as requiring a judgment call from the ministers. Where detailed statutory criteria are provided, the courts seem likely to accept that one minister could take the lead on criteria that clearly fell within his or her expertise, provided that the other ministers also turned their mind to those criteria. The weight to be given to detailed criteria would still be up to the ministers.

Applicants could argue that since Parliament chose not to divide relevant considerations between ministers by using a concurrence model, both ministers must have been intended to consider all relevant matters, regardless of what expertise seems to be required. But such an argument seems artificial and is unlikely to be accepted in light of *Wellington Airport*.

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[133] Ibid, at 202.
[134] *Save Happy Valley Coalition Inc v Minister of Conservation,* above n 26, at [25].
[135] Ibid, at [31].

In summary, failure to take relevant considerations into account would be a difficult ground to prove even if there was only one decision-making minister. But where there are two or more, this ground becomes even harder to make out, because of the extra room for judgment that the courts are likely to give the ministers.

(c) Joint process compromising independence

A third scenario may arise where the ministers ran a joint process, choosing one minister's department to take the lead to such an extent that another minister allegedly failed to make an independent decision because he or she had no independent advice or role. This scenario seems likely to occur in future, since *Save Happy Valley*[136] and material obtained under the OIA show that a joint process is common practice (see Section 2.4).

However, proving flaws in a joint process will be difficult. In *Save Happy Valley* each Minister received identical final advice, including a detailed decision-making tree, from their departmental legal advisers. Some collaboration or joint process appears to have occurred, though this is not explicitly stated.[137] But there was no suggestion that the similar advice had compromised the Ministers' independence, although arguably each should have received advice tailored to their particular interests.

One possibility is to allege that the non-lead minister received advice containing mistakes of fact, if that advice presented the legislative mandates and interests of that minister inaccurately. This ground would require a clear and pivotal mistake, meeting the high tests in *Northern Inshore Fisheries Company Ltd v Minister of Fisheries*[138] (see Section 3.2(f)).

Where there is no clear mistake of fact, but applicants are concerned that one minister's decision was not independent because of the overall tone and direction of the advice provided by the lead minister's department, the ground of fettering discretion could again be relied on. But the same basic difficulty would arise as with the other scenarios discussed above; that is, the courts would probably accept a high degree of reliance, including reliance on a joint process, before finding that a minister's discretion was fettered.

[136] Ibid, at [10]-[16].
[137] Ibid, at [7].
[138] *Northern Inshore Fisheries Company Ltd v Minister of Fisheries,* above n 102.

(d) Deadlock or failure to agree

A fourth scenario may arise where the ministers are unable to reach a decision. With concurrence, a refusal to concur stops the process outright, but with equal participation decisions, lengthy deadlocks are possible. Material obtained under the OIA indicates that DOC has concerns about this scenario (see Section 2.4).

A mining company or similar body that had applied for a permit or licence could argue that deadlocked ministers had breached their legitimate expectation of receiving a decision within a reasonable time.[139] Following *Vea v Minister of Immigration,*[140] the courts would probably find that the ministers gave an implied representation that a decision would be made within a reasonable time. However, what is a "reasonable time" depends on the circumstances.[141] The courts may find that where two or more ministers are involved, a "reasonable time" could be considerably longer than where there was only one minister, due to the greater need for discussion and negotiation.

Environmental groups probably could not rely on the ground of legitimate expectation, because they would not have made the application on which the ministers were deadlocked. The courts would be likely to view the implied representation from the ministers as extending only to the mining company.

However, even if a court found that the ministers had failed to decide within a reasonable time, the most likely result would be a declaration to that effect, and a referral back to the ministers of the decision at issue (see Section 3.2(f)). A mining company would be unlikely to persuade the court to declare that the ministers were required to exercise their statutory decision-making power in a particular way, even if all the evidence pointed towards a positive decision in the company's favour, as in *Fiordland Venison.*[142] Such a decision would come very close to substantive relief.

[139] Taylor *Judicial Review: A New Zealand Perspective,* above n 10, at 783-784.
[140] *Vea v Minister of Immigration* [2002] NZAR 171 (HC).
[141] Ibid, at 16, 18-19.
[142] *Fiordland Venison Ltd v Minister of Agriculture & Fisheries,* above n 72, at 350-351.

In practice, if ministers had reached a deadlock, resolution would probably be achieved in Cabinet. This would not only put the decision-making process out of the public eye, but also beyond the reach of judicial review.

(e) Predetermination

A fifth scenario may arise where the ministers appear to have made up their minds from the outset. Such decisions would naturally be challenged on the orthodox ground of predetermination.

The leading case is *CREEDNZ,*[143] where media statements suggested that a large aluminium smelter was likely to be approved. Cooke J commented that in a decision made by the Executive Council, the highest level of government, about a proposed activity of such large size and scope, it would be:[144]

> …naive to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.

The only relevant question was whether the Ministers genuinely addressed the statutory criteria at the time the decision was made. In *CREEDNZ* there was sufficient evidence that they did so.[145]

The same high test applies when the decision-maker is a single minister. *Hamilton City Council* held that "a certain degree of realism is required" in assessing predetermination allegations; a minister is not predisposed just because "a great deal of persuasion" is required to change his or her mind.[146] Similarly, *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* held that the Minister could not be expected to act with "judicial impartiality" because the relevant statutory scheme required the Minister to form a policy and notify his recommendation before finalising it.[147]

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[143] *CREEDNZ Inc v Governor-General,* above n 53.
[144] Ibid, at 179.
[145] Ibid.
[146] *Hamilton City Council v Waikato Electricity Authority,* above n 59, at 78-79.
[147] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries,* above n 57, at 17-18.

Therefore, where predetermination is alleged, the presence of an additional minister would not increase difficulties for applicants because the test is so hard to meet even with a single decision-maker. In a joint decision-making context, the courts would almost certainly accept that ministers could form preliminary views while negotiating towards a final decision, without closing their minds.

5.3 Effects of equal participation decisions on legal accountability

The consideration of hypothetical scenarios in Section 5.2 adds to the concerns raised in Chapter Four about the effects of joint decision-making on legal accountability.

The crucial difficulty is that ministers making equal participation decisions are likely to be given even more latitude by the courts than ministers making concurrence decisions. Concurrence requires completely separate and independent decisions. But by choosing an equal participation model instead, especially where no detailed criteria are provided, Parliament arguably intends to allow ministers to have more freedom. Ministers in this context may be able to rely more explicitly on each other, or divide responsibilities unequally, or run closely integrated joint processes, so long as all the ministers turn their minds to everything required for a lawful decision.

Further, concurrence is effectively a veto power, suggesting that the non-concurring minister has a somewhat subsidiary role. But equal participation means that any minister involved can disagree at any stage of the process, suggesting that each has equal freedom and power.

These factors suggest that ministers are intended to have more latitude on equal participation decisions. Therefore, it will probably be harder for applicants to prove that one of the ministers did not discharge his or her responsibilities in an equal participation decision. Applicants also face a high hurdle in the principle that weight is for the decision-maker.[148] This principle is arguably even more important in equal participation decisions, since the involvement of additional ministers can be interpreted as a signal from Parliament that the decision involves competing policies (see Section 3.2(b)).

[148] *Save Happy Valley Coalition Inc v Minister of Conservation,* above n 26, at [25].

While the courts might intervene in a deadlock between ministers, relief would probably consist of no more than a declaration requiring the ministers to decide in a reasonable time. Applicants might succeed in forcing the ministers to decide, but this would not affect the content of the final decision. Although applicants challenging decisions of a single minister may also have difficulty obtaining meaningful relief, those challenging joint ministerial decisions seem likely to experience even greater difficulties, because a court would probably be very reluctant to do anything which created the appearance of substituting the court's judgment for that of multiple ministers.

However, in situations where applicants allege either predetermination, or failure to take relevant considerations into account, the presence of an additional minister makes little difference. Both grounds are so difficult to prove, even with a single decision-maker, that any extra difficulties created by an additional minister are minimal.

Overall, an equal participation model of decision-making creates one major barrier for applicants, in addition to those discussed in Chapters Three and Four. That barrier is the extra room for judgment which the courts are likely to give to ministers making equal participation decisions.

Conclusion

The presence of additional decision-making ministers makes it harder for applicants to succeed on judicial review. Consequently, joint ministerial decision-making tends to reduce accountability, in the sense that the ministers have greater latitude and greater scope to push the boundaries of lawful decision-making.

The most significant hurdle for applicants is that the courts are likely to adopt a super-*Wednesbury* test for review of all types of joint ministerial decisions. By comparison, applicants challenging decisions of a single minister have a better chance of persuading the courts to take a harder look.

Applicants will probably have difficulty obtaining sufficient information to decide whether proceedings are worthwhile, and to determine which grounds of review should be used. Some applicants may be deterred from bringing proceedings at all due to the risk of having to pay costs. While there is no general duty for a single minister to give reasons either, ministers making joint decisions seem more likely to give no reasons or brief reasons, to conceal any disagreements or compromises that applicants might challenge.

A significant difficulty for applicants, regardless of which type of joint ministerial decision is challenged, is that relief will probably consist of referring the decision back to the ministers, which may result in the same decision. Although this problem also exists for those challenging decisions of a single minister, it is particularly acute for those challenging joint ministerial decisions. Such applicants already face significant barriers, so they may decide that if meaningful relief is unlikely, there is no point in bringing proceedings.

The examination of concurrence decisions in Chapter Four identified a grey area of law, in that the line between lawful and unlawful reliance is hard to draw. However, the courts seem likely to accept a high degree of reliance by one minister on another. Where Parliament chooses two or more ministers as decision-makers, Parliament may intend those ministers not only to advocate their own policies, but also to utilise each other's expertise. Further, little

evidence is needed to show that an independent decision was made. Similar problems arise wherever fettering discretion is alleged.

Decisions made by equal participation appear even harder to challenge. Applicants are likely to encounter additional difficulties in proving unlawful reliance, since Parliament arguably intends ministers making equal participation decisions to have more latitude. The principle that weight is for the decision-maker is likely to have a strong influence on courts undertaking judicial review of equal participation decisions.

Given the controversy which followed the Government's stocktake of the Crown Minerals Act 1991, joint ministerial decisions made under amendments to that Act seem likely to cause public concern. But only well-resourced groups are likely to bring proceedings, especially since outcomes are difficult to predict. Mining companies can probably afford litigation more easily than environmental groups. Therefore, making it harder for such groups to succeed on judicial review further strengthens the companies' position, and means that the ministers' decisions are less likely to be scrutinised.

On policy grounds, it is arguably undesirable for Parliament to introduce joint decision-making in respect of access to Crown land for mining. A better approach in terms of maintaining legal accountability would be the option rejected by Cabinet, of retaining MOC as sole decision-maker on access to Crown land, but with additional criteria to be considered.

In summary, the legal accountability of ministers making joint decisions is significantly reduced, although it is not removed altogether. PCE's concerns about the adverse effects of joint decision-making on general and political accountability are echoed by the results of this research, which concludes that joint decision-making ministers may be less legally accountable.

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Appendix One: Search Parameters Used in Brookers Database of New Zealand Statutes

The research process in Brookers involved a search for the word "Minister" in unordered proximity to other instances of "Minister" or "Ministers", combined with an unordered proximity search on the following keywords: "concur", "agree", "joint", "decision" and "consent". Each keyword was truncated to ensure that the searches located other permutations of the word. The keywords were chosen by reference to known statutory instances of joint decision-making, such as s 5 of the Marine Reserves Act 1971.

The proximity search was necessary in order to limit the number of hits to a manageable amount. The first search used a proximity figure of 10. Searches were then repeated using proximity figures of 25, 50, 100, 200, 300 and 400, with the aim of finding the figure at which the number of hits ceased to increase. This occurred with a proximity figure of 400.

Finally, five searches were run using that proximity figure, one search for each of the truncated keywords described above. The results of these searches are provided in Appendix Two and analysed in Appendix Three.

Appendix Two: Statutory Provisions Requiring Joint Ministerial Decisions

Statutory Provision	General Context	Paraphrased Content	Search Term
Accident Compensation Act 2001 Sections 301(1), 301(2)(c)	Commercial: Health services. Purchase of health services by Crown pursuant to service agreement between Ministers.	The Minister must enter into an annual service agreement with the Minister of Health, requiring the Crown to purchase specified public health acute services. The agreement must contain the terms and conditions that the Minister and the Minister of Health agree on.	"ministers minister" @400 AND agree*
Airport Authorities Act 1966 Sections 3A(1), 3A(5), 5(1), 5(3)	Commercial: Company formation. Formation of airport companies by Ministers.	The Minister for State-Owned Enterprises and the Minister of Finance and any local authorities may form an airport company. The Ministers may exercise the Crown's rights and powers as holder of any equity or debt securities. Any airport authority may act in conjunction with the Minister or any local or airport authority to enter into and carry out agreements that seem most suited to the circumstances. Where in the opinion of the Minister of Finance and the Minister, any work related to an airport in accordance with s 5(1) has both national and local importance, the agreement is deemed to be entered into under the Public Works Act 1981 s 224.	"ministers minister" @400 AND joint*
Alcohol Advisory Council Act 1976 Section 25	Financial: Determination of levies by Ministers.	The Minister of Health, acting with the concurrence of the Minister of Finance, shall assess an aggregate expenditure figure for each financial year. The Minister of Health shall then determine the aggregate levy figure for that year.	"with the concurrence of the Minister"
Alcoholism and Drug Addiction Act 1966 Section 21	Penal: Treatment of persons detained in prison and addicted to alcohol and drugs.	The Minister who is responsible for the Department of Corrections, with the concurrence of the Minister of Health, may transfer a person detained in prison to an institution under this Act for treatment. The Minister who is responsible for the Department of Corrections, with the concurrence of the Minister of Health, may direct the return of a person to prison for the purpose of continuing to serve any applicable sentence. A person detained in an institution under this section shall not be discharged or permitted to be absent, except with the consent of the Minister who is responsible for the Department of Corrections, and subject to such terms and conditions as that Minister may impose with the concurrence of the Minister of Health.	"with the concurrence of the Minister"
Auckland Airport Act	Commercial: Company formation.	The Ministers (Minister of Finance and Minister for State-Owned Enterprises) may form	"ministers

1987 Sections 4(1), 4(5A), 4(6)	Formation of public airport company by Ministers.	and register a public company. The Ministers may exercise the Crown's rights and powers as holder of any equity or debt securities. On and after the vesting day the company shall be deemed to be an airport company under the Airport Authorities Act 1966.	minister"@400 AND deci*
Civil Aviation Act 1990 Section 95	Financial: Authorisation of spending for joint venture airports.	Any money held on behalf of the Crown as a result of the operation of a joint venture airport may, with the approval of the Minister of Finance, be retained on behalf of the Crown, and used for such purposes in connection with the airport as may be authorised by the Minister responsible for this Act, with the concurrence of the Minister of Finance.	"with the concurrence of the Minister"
Conservation Act 1987 Section 60C	Conservation: Cost recovery. Cost recovery relating to indirect applications for concessions, licences and other approvals.	Where a person applies for or requests another person (other than a person working for the Department of Conservation) to do something that may not be done without a concession or similar approval (including by an Order in Council made on the recommendation of the Minister, or the Minister and one or more other Ministers jointly), and in consequence, an application or request is made to the Department of Conservation or the Minister, then s 60B (relating to cost recovery by the Director-General of Conservation) shall have effect as if the request had been made directly.	"ministers minister"@400 AND concur*
Consular Privileges and Immunities Act 1971 Section 4	Financial: Determination of fiscal privileges for consulates.	The Minister of Foreign Affairs and Trade, with the concurrence of the Minister of Finance, may determine the fiscal privileges to be accorded to any consular post or persons connected with that post.	"with the concurrence of the Minister"
Cook Islands Act 1915 Section 275A	Penal: Treatment of Cook Islands citizens detained in prison.	Where any person (an offender) is imprisoned in New Zealand under s 275 of this Act, the Minister of Justice may grant remission of any part of the sentence, and with the concurrence of the Minister of Foreign Affairs, may revoke any such remission before the offender is released, if the Minister of Justice is satisfied that the person's conduct has been unsatisfactory or the grant was made in error. Where the Minister of Justice considers that the offender's conduct has been exemplary, the Minister of Justice may grant a special additional remission, and with the concurrence of the Minister of Foreign Affairs, revoke it at any time before the offender is released. The Minister of Justice, with the concurrence of the Minister of Foreign Affairs, may direct that the offender be allowed to remain in New Zealand. Where an offender is to be returned to the Cook Islands, the Minister of Justice, with the concurrence of the Minister of Foreign Affairs, may direct that the offender be subject to supervision. Where any offender desires to return to the Cook Islands before the term of probation has expired, the Minister of Justice, with the concurrence of the Minister of Foreign Affairs, may cancel the probationary licence and direct that the offender shall be subject to	"with the concurrence of the Minister"

		supervision in the Cook Islands. Recommendations of the Parole Board under this section may be given effect to in pursuance of a warrant signed by the Minister of Justice, with the concurrence of the Minister of Foreign Affairs.	
Criminal Justice Act 1985 Section 147	Financial: Payment of voluntary groups and organisations.	The Minister responsible for the Department of Corrections may, with the concurrence of the Minister of Finance, approve the payment of money towards the expenses of various voluntary groups and organisations defined in this section.	“with the concurrence of the Minister”
Crown Forest Assets Act 1989 Sections 9, 23, 24, 28	Commercial: Licensed forestry land. Appointment of manager by Ministers. Review of covenants and easements by Ministers.	The responsible Ministers may appoint Crown Forestry Management Limited or any other person to act on the Crown’s behalf to manage any Crown forest land, forestry assets or forestry licences. Where licensed land is returned to Māori ownership, the licensor may require review of the need for or the terms of any protective covenant or public access easement. The responsible Ministers (the Minister for State-Owned Enterprises and the Minister of Finance), together with the Minister of Conservation and the Minister of Māori Affairs, shall jointly consider whether the covenant or easement is still appropriate, having regard to the fact that the land has been returned to Māori ownership, and may vary or cancel it. Every Crown forestry licence shall, where appropriate, provide for public access rights, to be determined by the responsible Ministers in consultation with the Minister of Conservation, the Minister for the Environment, and any other persons considered to have an interest by the responsible Ministers.	"ministers minister"@400 AND agree* "ministers minister"@400 AND joint*
Crown Minerals Act 1991 Sections 61(2), 61(4), 61(6), 116	Mineral resources: Amendment of Schedule 4. Revocation of notice of land set aside for mining purposes.	The Governor-General may, by Order in Council made on the recommendation of the Minister and the Minister of Conservation, amend Schedule 4. No Order in Council shall be made in respect of land held under the Conservation Act 1987 as an ecological area, unless the Minister and the Minister of Conservation make a recommendation to the Governor-General after assessing the scientific value for which the land is held, and the value of any Crown minerals in it. Notices issued under the Mining Act 1971 shall continue to have effect until revoked by the Minister of Energy. The Minister of Energy may only revoke a notice made under section 24(1)(aa) of the Mining Act 1971 with the concurrence of the Minister of Conservation. The Minister of Energy may only revoke a notice made under section 24(1)(b) of the Mining Act 1971 with the concurrence of the Minister of Lands.	"ministers minister"@400 AND agree*
Crown Research Institutes Act 1992 Sections 15, 24	Commercial: Directions to board. Transfer of assets and liabilities.	The shareholding Ministers may direct the board to include or omit provisions in statements of corporate intent, including provisions relating to international obligations, and determine dividends. The shareholding Ministers may transfer Crown assets and liabilities to a Crown Research Institute, authorise the Crown Research Institute to act on the Crown’s behalf	"ministers minister"@400 AND agree*

		in providing goods or services, and grant leases, licences or rights of any kind to a Crown Research Institute in respect of any Crown assets and liabilities.	
Defence Act 1990 Section 46	Financial: Provision of educational and other funds.	Regulations may be made fixing certain terms and conditions of service, including providing for the establishment of educational, training and entertainment funds, and such other funds as the Minister of Defence, with the concurrence of the Minister of Finance, may prescribe.	"with the concurrence of the Minister"
Diplomatic Privileges and Immunities Act 1968 Sections 5, 19	Financial: Determination of fiscal privileges for missions.	The Minister of Foreign Affairs and Trade, with the concurrence of the Minister of Finance, may determine the fiscal privileges which shall be accorded to any mission or persons connected with it. The Minister of Foreign Affairs and Trade, with the concurrence of the Minister of Finance, may wholly or partly exempt various persons specified in this section from any public or local tax, duty, rate, levy or fee.	"with the concurrence of the Minister"
Education Act 1964 Section 97A	Financial: Payment of salaries and other expenses.	The Minister of Education may declare particular continuing education organisations to be recognised. Sums may be paid to such organisations towards staff salaries and other expenses, if approved by the Minister of Education with the concurrence of the Minister of Finance.	"with the concurrence of the Minister"
Electricity Act 1992 Section 43A (inserted by Electricity Industry Act 2010 Section 163)	Commercial: Electricity. Division of responsibility among Ministries.	All Ministers responsible for administering this Act must, by agreement, identify which codes are to be administered by which Ministry.	"ministers minister"@400 AND agree*
Electricity Industry Act 2010 Section 119	Commercial: Electricity. Directions by Ministers to State generators.	The shareholding Ministers may give directions to State generators (to enter contracts with each other, transfer assets to each other, and similar acts), despite anything to the contrary in other Acts.	"ministers minister"@400 AND agree*
Films, Videos, and Publications Classification Act 1993 Sections 80, 93	Media: Appointment of Censor and members of Board.	The Chief Censor and the Deputy Chief Censor must be appointed on the recommendation of the Minister of Internal Affairs, acting with the concurrence of the Minister of Women's Affairs and the Minister of Justice. The members of the Film and Literature Board of Review shall be appointed by the Governor-General on the recommendation of the Minister of Internal Affairs, acting with the concurrence of the Minister of Women's Affairs and the Minister of Justice.	"with the concurrence of the Minister"
Finance Act 1971 Section 6	Financial: Payments for benefit of timber industry.	Money may be paid out of the Timber Workers' Housing Pool Account into the Public Account, in such amounts as the Minister of Finance may approve. The money may be spent in such ways as the Minister of Forests, with the concurrence of the Minister of Finance, determines will be for the benefit of the sawmilling and timber industry.	"with the concurrence of the Minister"

Fisheries Act 1996 Sections 14A, 57E, 57F, 57G, 57H, 57I	Overseas investment: Fishing. Application of alternative total allowable catch to quota. Process that Ministers must follow in deciding whether to consent to overseas investment in fishing quota.	The Governor-General may, by Order in Council, apply section 14B of this Act (concerning alternative total allowable catch) to the quota management stock specified in the order. The Order must be made on the recommendation of the Minister of Fisheries with the concurrence of the Minister responsible for the Environment Act 1986. The relevant Ministers (the Minister of Fisheries and the Minister of Finance), in deciding whether to consent to an overseas investment transaction under the overseas investment fishing provisions, must have regard to only those criteria and factors that apply under this Act, may consult any person they consider appropriate, must grant consent if satisfied that all the s 57G criteria are met, and must decline consent if not so satisfied. The Ministers may determine which of certain specified persons is the relevant overseas person for an overseas investment. The criteria for an overseas investment in fishing quota are all of: the relevant overseas person is a body corporate; the individuals with control of the relevant overseas person have relevant business experience; the relevant overseas person has demonstrated financial commitment to the overseas investment; all individuals with control of the relevant overseas person are of good character; none of the individuals with control of the relevant overseas person are ineligible for visas or entry permissions; the interest in fishing quota is capable of being registered in the Quota Register or the Annual Catch Entitlement Register; and the granting of consent is in the national interest under s 57H. The relevant Ministers must consider all the following factors to determine which are relevant to the overseas investment: whether it will or is likely to create new job opportunities in New Zealand or retain existing jobs; the introduction of new technology or business skills into New Zealand; increased export receipts for New Zealand exporters; added competition or efficiency in New Zealand; the introduction of additional investment into New Zealand for purposes of significant development; increased processing of fish or aquatic life in New Zealand; or any other factors the relevant Ministers think fit. Having regard to the above factors, the relevant Ministers must determine whether s 57G(1)(g) (whether the granting of consent is in the national interest) is met, and in doing so, may determine the relative importance of each factor. For the purposes of s 57G(1)(d), (whether all individuals with control of the relevant overseas person are of good character), the Ministers must take into account certain specified offences or contraventions of the law, or any other matter that reflects adversely on the person's fitness to have the particular overseas investment.	"ministers minister"@400 AND joint*
Forests (West Coast Accord) Act 2000 Section 8	Conservation: Status of land. Change of status of West Coast	The responsible Ministers (the Minister for State-Owned Enterprises and the Minister of Finance) may jointly declare land in Schedule 1 to be held under the Conservation Act 1987, or set apart as a reserve, or added to a national park, or Crown land.	"ministers minister"@400 AND joint*

	indigenous production forest land by Ministers.	Before making such a declaration, the responsible Ministers must consult with the Minister of Conservation, the Minister of Forestry, and the Minister for Land Information. Regarding adding land to national parks, the responsible Ministers must not make such a declaration unless the Minister of Conservation recommends it; and the Minister of Conservation must not recommend it except on the recommendation of the New Zealand Conservation Authority, made after consultation with the appropriate Conservation Board.	
Health Act 1956 Section 132A	Financial: Establishment of bursaries.	The Minister of Health may establish bursaries to assist suitable persons to qualify for professions connected with health, with the concurrence of the Minister of Finance.	"with the concurrence of the Minister"
Health Sector (Transfers) Act 1993 Sections 4, 5 Schedule 1 Clause 16	Commercial: Transfer of assets and liabilities, delegation.	The transferring Ministers may, on behalf of any transferor, transfer any assets or liabilities, and authorise any transferee to act on behalf of the transferor in providing goods and services or managing assets and liabilities. The transferring Ministers may recommend that the Governor-General make an Order in Council, approving a proposal to transfer assets or liabilities, or authorise transferees to act on behalf of the transferor in providing goods and services or managing assets and liabilities. Any agreement or proposal made under sections 4-5 may authorise either or both of the transferring Ministers to take actions or make decisions as specified in that agreement or proposal; and may authorise each transferring Minister to appoint an agent for any matters described in the agreement or proposal.	"ministers minister"@400 AND agree* "ministers minister"@400 AND joint*
Housing Restructuring and Tenancy Matters Act 1992 Section 22	Commercial: Transfer of assets and liabilities, delegation, grant of leases and licenses.	The shareholding Ministers may: enter into an agreement with the company as to which State or Corporation housing assets and liabilities shall be vested in the company; authorise the company to act on the Crown's behalf in providing housing services or managing State or Corporation housing assets and liabilities; and grant leases, licences or rights of any kind in respect of State or Corporation housing assets and liabilities.	"ministers minister"@400 AND agree*
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 Section 144	Financial: Remuneration of inspectors.	The Minister of Health may, with the concurrence of the Minister of Finance, fix or vary the remuneration of district inspectors.	"with the concurrence of the Minister"
Land Transport Management Act 2003 Sections 65N, 65P	Transport: Regional fuel tax.	The responsible Ministers (the Minister of Finance and the Minister of Transport) may, after considering a proposed or amended regional fuel tax scheme, recommend that the Governor-General make an Order in Council approving it; or refer the scheme back to the regional council for further consideration; or decline to recommend the making of an Order in Council. The responsible Ministers must not recommend the making of an Order in Council	"ministers minister"@400 AND deci*

		unless satisfied that the following have been correctly considered: the matters in section 65J (relating to regional benefits, relevant policy documents, funding, and mitigation of impacts on residents and retailers); the impact of the proposed scheme on the national land transport programme; and for schemes under section 65M (relating to Auckland), whether the scheme will contribute to the land transport system and result in a net benefit to the Auckland Region.	
Local Government Act 2002 Schedule 15, Part 2, Clause 29	Financial: Remuneration of Commissioners and committee members.	The Minister responsible for this Act, with the concurrence of the Minister of Finance, may fix remuneration for Commissioners, Deputy Commissioners, and certain members of advisory committees.	"with the concurrence of the Minister"
Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003 Sections 16, 17	Media: Establishment of Te Pūtahi Paoho. Dispute resolution procedures.	The responsible Ministers (the Minister of Māori Affairs and the Minister of Finance) and the chairperson of Te Pūtahi Paoho (the Māori Television Electoral College, established by section 12), acting jointly, must: appoint a chairperson and deputy chairperson of the board; determine remuneration and benefits for the board; approve the statement of intent prepared by the board; may review the performance of the Service; may consent to reappointment of a director; and must perform any other functions or duties required by this Act. If the responsible Ministers and the chairperson are unable to agree on one of the above matters for which their joint determination is required, they must appoint a mediator in accordance with this Act.	"ministers minister"@400 AND deci*
Marine Mammals Protection Act 1978 Sections 3E, F, H, 22	Conservation: Population management plans, marine mammal sanctuaries.	The Minister of Conservation may from time to time approve population management plans for particular threatened species. Population management plans may contain matters specified in the statute, including a maximum allowable level of fishing-related mortality for the species, which should allow it to reach non-threatened status. The Director-General of Conservation shall prepare population management plans in accordance with specific statutory processes. The Minister of Conservation, after having regard to specific statutory requirements, all submissions made, and such other matters as the Minister of Conservation considers relevant, may approve the population management plan subject to the concurrence of the Minister of Fisheries and refer it to the Minister of Fisheries for concurrence. The Minister of Fisheries may concur, after having regard to the impacts on commercial fishing, and such other matters as the Minister of Fisheries considers relevant. The Minister of Conservation, with the concurrence of the Minister of Fisheries, may approve the population management plan. The Minister of Conservation may declare marine mammal sanctuaries by notice in the *Gazette*. Where another Minister has control of any Crown-owned land, foreshore, seabed, or	Existence of provisions already known

		waters of the sea which is declared to be a marine mammal sanctuary, the consent of that Minister shall be notified concurrently with the notice declaring the sanctuary.	
Marine Reserves Act 1971 Sections 4, 5	Conservation: Marine reserves.	Governor-General may declare marine reserves, subject to conditions recommended by the Minister. No area within the jurisdiction of any harbour board shall be declared a marine reserve without the harbour board's consent. No public work (unless authorised by this Act) may be undertaken in a marine reserve, except with the consent of the Minister of Conservation and the Minister in charge of the department controlling the work. The public work is subject to conditions jointly imposed by the Ministers. The right to do anything in a marine reserve by virtue of a mining interest may be made subject to this Act by the Minister of Energy, with the concurrence of the Minister of Conservation. No marine reserve shall be declared, unless the application is made by one or more parties named in the Act, and the process laid out in this Act has been followed. Any persons wishing to object must do so in writing to the Director-General of Conservation, who shall refer all objections to the Minister of Conservation. Before considering an application for a marine reserve, the Minister of Conservation shall decide whether or not any objections should be upheld; and shall uphold an objection if satisfied that declaring the area a marine reserve would interfere unduly with: any estate or interest in land; any right of navigation; commercial fishing; recreational usage; and the public interest generally. If, after considering all objections, the Minister of Conservation's opinion is that no objection should be upheld and that the area should be declared a marine reserve, the Minister of Conservation shall, if the Ministers of Transport and Fisheries concur, recommend the making of an Order in Council to the Governor-General.	"ministers minister"@400 AND concur*
Mental Health (Compulsory Assessment and Treatment) Act 1992 Sections 94, 128, 134	Financial: Remuneration of inspectors and medical practitioners. Penal: Removal of patients to places outside New Zealand.	The Minister of Health may, with the concurrence of the Minister of Finance, fix or vary the remuneration of district inspectors. If it appears to the Minister of Health that removing a patient subject to a compulsory treatment order to a place outside New Zealand would be to the benefit of that patient, the Minister may make such order as the Minister thinks fit; and in the case of a special patient, the Minister of Health may do so with the concurrence of the Minister responsible for the Department of Corrections. If no fee is prescribed for a medical practitioner, the practitioner must be paid such a fee as the Minister of Health, with the concurrence of the Minister of Finance, directs.	"with the concurrence of the Minister"
New Zealand Railways Corporation Restructuring Act 1990	Commercial: Company formation, transfer of assets and liabilities.	The Minister of Finance and the Minister for State-Owned Enterprises may form companies in which the liability of the shareholders is limited, under the Companies Act 1993.	"ministers minister"@400 AND joint*

Sections 4, 6		The Ministers may acquire shares in a transferee company. The Ministers may prepare lists specifying which railways assets and liabilities should be vested in the Crown or a Crown transferee company. The Governor-General may vest the named railways assets and liabilities in the Crown or a Crown transferee company by Order in Council.	"ministers minister"@400 AND agree*
Niue Act 1966 Sections 244, 320	Penal: Treatment of citizens of Niue detained in prison.	Where any person (an offender) is imprisoned in New Zealand under s 243 of this Act, the Minister of Justice may grant remission of any part of the sentence. If the offender is to be released in New Zealand, the Minister of Justice, with the concurrence of the Minister of Foreign Affairs, may impose such special conditions as the Minister of Justice thinks fit. If the offender is to be returned to Niue, the Minister of Justice, with the concurrence of the Minister of Foreign Affairs, may direct that the offender be subject to supervision. Where any offender desires to return to Niue before the term of probation has expired, the Minister of Justice, with the concurrence of the Minister of Foreign Affairs, may cancel the probationary licence and direct that the offender shall be subject to supervision in Niue. Recommendations of the Parole Board under this section may be given effect to in pursuance of a warrant signed by the Minister of Justice, with the concurrence of the Minister of Foreign Affairs.	"with the concurrence of the Minister"
Overseas Investment Act 2005 Sections 6, 14, 15, 16, 17, 18, 19, 20, 22, 24, 27	Overseas investment: Process for granting consent to overseas investment transactions.	The relevant Ministers, in considering whether to grant consent to an overseas investment transaction, must have regard only to the criteria and factors applying to the relevant category of overseas investment under this Act; may consult as they think appropriate; must grant consent if satisfied that all the relevant criteria are met; and must decline to grant consent if not satisfied that those criteria are met. The relevant Ministers may determine who is a relevant overseas person for an overseas investment, following specific statutory criteria. Specific statutory criteria are provided for overseas investments in sensitive land. Factors for assessing the benefit of overseas investments in sensitive land are also provided; the relevant Ministers must consider these factors where the specific statutory criteria require them to do so. Specific statutory criteria are provided for overseas investments in significant business assets. Factors relating to whether a person is of good character are also provided; the relevant Ministers must consider these factors where the specific statutory criteria require them to do so. The relevant Ministers may decide that a particular overseas investment need not meet the farm offer criterion, which ordinarily requires that the land be offered on the open market to persons who are not overseas persons, before an overseas investment can	"ministers minister"@400 AND consent* "ministers minister"@400 AND agree*

		occur. Each overseas person making an overseas investment transaction must apply for consent for that transaction. An application must be decided by: for land decisions, the Minister and the Minister for Land Information; for business decisions, the Minister who is for the time being responsible for this Act; for fishing quota decisions, the Minister and the Minister of Fisheries; and for decisions in one or more of those categories, all the relevant Ministers. Ministers may delegate the power to decide. Consent to an application may be varied by the relevant Ministers with the agreement of the consent holder, and the relevant Ministers may revoke a condition of consent.	
Private Schools Conditional Integration Act 1975 Sections 16, 42	Financial: Writing off debts and approving loans.	The Minister of Education may, with the concurrence of the Minister of Finance, approve the provisional writing off of part or all of any debt owed by any integrated school to the Crown. The Minister of Education may, with the concurrence of the Minister of Finance, approve the granting of loans to any integrated school.	“with the concurrence of the Minister”
Resource Management Act 1991 Sections 393, 400	Coastal permits: Transitional provisions.	Where an application has been made for reclamation of land or harbour works, before the date of commencement of the Resource Management Act 1991 (and a recommendation to the Governor-General has not been made or the application has not been approved by the Minister of Transport or the Minister of Conservation or both), the application is deemed to be an application for a coastal permit. The relevant Ministers shall refer the application to the relevant regional council. After the date of commencement of the Resource Management Act 1991, functions that were exercisable by a controlling authority under s 28(5) Marine Farming Act 1971 may continue to be exercised by any regional council, but the regional council shall not make any declaration under that subsection without the prior consent of the Minister of Fisheries, given with the concurrence of the Minister of Transport.	"ministers minister"@400 AND deci*
Southland Electricity Act 1993 Section 16	Commercial: Transfer of assets and liabilities.	The shareholding Ministers (the Minister of Finance and the Minister designated as responsible for this Act) may transfer Crown assets and liabilities to The Power Company Ltd; authorise the company to act on the Crown’s behalf to provide goods and services or manage assets and liabilities; and grant leases, licenses, or rights of any kind to the company.	"ministers minister"@400 AND agree*
State-Owned Enterprises Act 1986 Section 23	Commercial: Transfer of assets and liabilities.	The shareholding Ministers for a State enterprise named in Schedule 2 of this Act may: transfer Crown assets and liabilities to the State enterprise; authorise the State enterprise to act on the Crown’s behalf to provide goods and services or manage assets and liabilities; vest any rights conferred by designations in the State enterprise; and grant leases, licenses, or rights of any kind to the State enterprise.	"ministers minister"@400 AND agree*
Trans-Tasman Mutual	Employment and immigration.	The Minister and a Minister from one or more Australian jurisdictions may jointly	"ministers

Recognition Act 1997 Section 31		declare that specified occupations are equivalent, and may specify conditions that registration authorities must impose to achieve equivalence.	minister"@400 AND joint*
Utilities Access Act 2010 Section 18	Transport: Access by utility operators.	If no Code of Practice regulating access by utility operators to transport corridors has been made, then the Governor-General may, on the recommendation of the Minister, make regulations regulating access by utility operators to transport corridors. The Minister may not recommend making regulations unless the Minister is satisfied that no Code is likely to be in effect, that the regulations are likely to improve efficiency, and that the related Ministers (those responsible for administering the Local Government Act 1974, the Electricity Act 1992, the Gas Act 1992, the Government Roading Powers Act 1989, the Telecommunications Act 2001, and the Railways Act 2005) have been consulted and concur in the desirability of making the regulations and the content of the regulations.	"ministers minister"@400 AND concur*
Waterfront Industry Reform Act 1989 Section 9	Commercial: Liquidators.	The joint Ministers (the Minister of Labour and the Minister of Transport) shall appoint a suitable person to be the liquidator in relation to the affairs of the Waterfront Industry Commission.	"ministers minister"@400 AND agree*
Waterfront Industry Restructuring Act 1989 Schedule 2 Clause 4	Financial: Remuneration.	The Waterfront Industry Restructuring Authority may, in accordance with any authority given by the Minister of Transport with the concurrence of the Minister of Finance, pay remuneration to certain specified persons.	"with the concurrence of the Minister"
Wellington Airport Act 1990 Section 4	Commercial: Company formation.	The Ministers (Minister of Finance and Minister for State-Owned Enterprises) may form and register a public company to own and operate the airport. The Ministers may exercise the Crown's rights and powers as holder of any equity or debt securities. On and after the vesting day the company shall be deemed to be an airport company under the Airport Authorities Act 1966.	"ministers minister"@400 AND deci*
Wildlife Act 1953 Sections 14F, G, I, 71	Conservation: Population management plans, relationship with other statutes.	The Minister of Conservation may from time to time approve population management plans for particular threatened species. Population management plans may contain matters specified in the statute, including a maximum allowable level of fishing-related mortality for the species, which should allow it to reach non-threatened status. The Director-General of Conservation shall prepare population management plans in accordance with specific statutory processes. The Minister of Conservation, after having regard to specific statutory requirements, all submissions made, and such other matters as the Minister of Conservation considers relevant, may approve the population management plan subject to the concurrence of the Minister of Fisheries and refer it to the Minister of Fisheries for concurrence. The Minister of Fisheries may concur, after having regard to the impacts on commercial fishing, and such other matters as the Minister of Fisheries considers relevant.	"ministers minister"@400 AND joint*

		The Minister of Conservation, with the concurrence of the Minister of Fisheries, may approve the population management plan. Except where this Act provides otherwise, nothing in this Act derogates from any provision of the Acts in Schedule 9; provided that no person is entitled to do any act or exercise any authority in respect of wildlife, except with the prior consent of the Minister of Conservation and the Minister administering the Act under which the act or authority is done or exercised.	

Appendix Three: Analysis of Relevant Statutory Provisions

Context	Provision	Frequency (Detailed Context)	Frequency (General Context)	Type of Provision
Coastal permits: transitional provisions.	Resource Management Act 1991, ss 393, 400.	1	1	Concurrence.
Conservation: cost recovery.	Conservation Act 1987, s 60C.	1	7	Equal participation.
Conservation: status of land.	Forests (West Coast Accord) Act 2000, s 8(1)(a), (b), (d).	1		Equal participation (declaring land to be held for conservation purposes, set aside as reserve, or Crown land).
	Forests (West Coast Accord) Act 2000, s 8(1)(c), s(8)(3)(a).	1		Concurrence (adding land to national park).
Conservation: population management plans.	Marine Mammals Protection Act 1978, ss 3E, F, H. Wildlife Act 1953, ss 14F, G, I.	2		Concurrence.
Conservation: marine mammal sanctuaries.	Marine Mammals Protection Act 1978, s 22.	1		Concurrence.
Conservation: marine reserves.	Marine Reserves Act 1971, ss 4, 5.	1		Concurrence.
Conservation: relationship with other statutes.	Wildlife Act 1953, s 71.	1	1	Anomalous: aspects of both concurrence and equal participation.
Commercial: health services.	Accident Compensation Act 2001, ss 301(1), 301(2)(c).	1	14	Equal participation.
Commercial: licensed forestry land.	Crown Forest Assets Act 1989, ss 9, 23, 24, 28.	1		Equal participation.
Commercial: company formation, directions to board, transfer of assets and liabilities, delegation, grant	Airport Authorities Act 1966, ss 3A(1), 3A(5), 5(1), 5(3). Auckland Airport Act 1987, ss 4(1), 4(5A), 4(6). Crown Research Institutes Act 1992, ss 15, 24. Health Sector (Transfers) Act 1993, ss 4, 5, Schedule 1 Clause	9		Equal participation.

of leases and licenses.	16. Housing Restructuring and Tenancy Matters Act 1992, s 22. New Zealand Railways Corporation Restructuring Act 1990, ss 4, 6. Southland Electricity Act 1993, s 16. State-Owned Enterprises Act 1986, s 23. Wellington Airport Act 1990, s 4.			
Commercial: electricity.	Electricity Act 1992, s 43A (inserted by Electricity Industry Act 2010, s 163). Electricity Industry Act 2010, s 119.	2		Equal participation.
Commercial: appointment of liquidators.	Waterfront Industry Reform Act 1989, s 9.	1		Equal participation.
Employment and immigration.	Trans-Tasman Mutual Recognition Act 1997, s 31.	1	1	Equal participation.
Financial.	Alcohol Advisory Council Act 1976, s 25. Civil Aviation Act 1990, s 95. Consular Privileges and Immunities Act 1971, s 4. Criminal Justice Act 1985, s 147. Defence Act 1990, s 46. Diplomatic Privileges and Immunities Act 1968, ss 5, 19. Education Act 1964, s 97A. Finance Act 1971, s 6. Health Act 1956, s 132A. Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 144. Local Government Act 2002, Schedule 15, Part 2, Clause 29. Mental Health (Compulsory Assessment and Treatment) Act 1992, s 94. Private Schools Conditional Integration Act 1975, ss 16, 42. Waterfront Industry Restructuring Act 1989, Schedule 2 Clause 4.	14	14	Concurrence.
Fisheries: alternative total allowable catch.	Fisheries Act 1996, ss 14A.	1	1	Concurrence.
Media.	Films, Videos, and Publications Classification Act 1993, ss 80, 93. Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, ss 16, 17.	2	2	Concurrence (appointment of Film and Literature Board of Review). Equal participation (appointment of

				Board of Maori Television Service).
Mineral resources.	Crown Minerals Act 1991, ss 61(2), 61(4), 61(6), 116. Crown Minerals Act 1991, s 116(2).	1	1	Equal participation (amending Schedule 4). Concurrence (revocation of notice of land set aside for mining).
Overseas investment: fishing quota.	Fisheries Act 1996, ss 57E, 57F, 57G, 57H, 57I.	1	2	Equal participation.
Overseas investment: general.	Overseas Investment Act 2005 , ss 6, 14, 15, 16, 17, 18, 19, 20, 22, 24, 27.	1		Equal participation.
Penal.	Alcoholism and Drug Addiction Act 1966, s 21. Cook Islands Act 1915, s 275A. Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 128, 134. Niue Act 1966, ss 244, 320.	4	4	Concurrence.
Transport: access by utility operators.	Utilities Access Act 2010, s 18.	1	2	Concurrence.
Transport: regional fuel tax.	Land Transport Management Act 2003, ss 65N, 65P.	1		Equal participation.
TOTALS FOR CONTEXT: **Coastal permits = 1** **Conservation = 8** **Commercial = 14** **Employment = 1** **Financial = 14** **Fisheries (total allowable catch) = 1** **Media = 2** **Mineral resources = 2** **Overseas investment (including fishing quota) = 2** **Penal = 4** **Transport = 2** **(Grand Total = 51)**				**TOTALS FOR PROVISION TYPE:** **Concurrence = 28** **Equal participation = 22** **Anomalous situations = 1** **(Grand Total = 51)**