IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-1972

IN THE MATTER OF	an application for review under Part 1 of the Judicature Amendment Act 1972
BETWEEN	IMPORTED MOTOR VEHICLE INDUSTRY ASSOCIATION INCORPORATED Applicant
AND	MINISTER OF TRANSPORT Respondent

Hearing: 28 November 2011

Counsel: DPH Jones QC for Applicant
H L Dempster and J Gorman for Respondent

Judgment: 1 December 2011 at 12:30 PM

JUDGMENT OF MILLER J

Introduction

[1] The Imported Motor Vehicle Industry Association Inc, which I will call the IMVIA,[1] seeks judicial review of emissions standards for used light petrol-powered motor vehicles imported into New Zealand.

[2] From 1 January 2012 such vehicles must have complied when manufactured with an emission standard known as Japan 05, or the equivalent standard in other jurisdictions, before they may be certified for use on New Zealand roads. This development is the third and final phase in the implementation of improved emission

[1] It was formerly called the Imported Motor Vehicle Dealers Association, but I will use IMVIA throughout.

standards prescribed under the Land Transport Rule: Vehicle Exhaust Emissions 2007, which came into force in May 2008.

[3] The IMVIA asks the Court to order the Minister of Transport, whose predecessor made the Rule under delegated legislative authority, to review the Rule and its effects. Because the third phase requires no further executive action and will happen within weeks, Mr Jones QC realistically acknowledged that the third phase will take effect before such review is completed. It is not suggested that the Court may compel the Minister to change the Rule in the meantime.

[4] The IMVIA relies on an alleged promise made in 2008 by the then Associate Minister of Transport that the Rule would be reviewed within three years of its implementation. The promise is denied, and the Minister says that in any event the Rule has been reviewed. The IMVIA's rejoinder is that there has been no real review, for the Minister's mind was and is closed to the evidence.

Background to the Rule

[5] New Zealand has no domestic motor vehicle manufacturing industry, and not until 2003 did it impose emission standards on new and used vehicles imported into the country. Under the 2003 regime minimum standards were set for new vehicles, but used ones need only have been built to an approved standard applicable when manufactured.

[6] In December 2005 Cabinet decided that the Ministry should investigate minimum emissions standards for used petrol and diesel vehicles. The decision contemplated that the standards would be updated continually to include new emissions standards as they were adopted internationally. The Ministry was directed to consult interested parties about updating the 2003 regime to incorporate the Japan 05 standard and its European equivalent, known as Euro 4, for new vehicles. The Ministry was also to investigate emissions standards for used vehicles, regarding which emissions standards were thought at that time to raise potential international trade issues.

[7] Public consultation followed during 2006. The IMVIA was heavily involved in this process, which led to a Cabinet decision on 30 January 2007. Cabinet had before it a paper from the Ministry which recommended updated emissions standards for used vehicles in preference to alternative mechanisms such as a rolling age ban. The paper predicted that if standards were not updated, importers would continue purchasing vehicles that only just exceeded the minimum standard, a practice which had resulted in the average age of imported vehicles increasing each successive year.

[8] Cabinet agreed that the Ministry should prepare a draft Rule for consultation, proposing minimum emission standards based on a time lag from implementation in Japan. So, for example, the minimum standard in New Zealand in 2008 would be that implemented in Japan six to eight years earlier, and the minimum standard in 2013 would be that implemented in Japan four years earlier.

[9] The draft Rule was the subject of formal consultation which began in May 2007. There were some 84 submissions, including a comprehensive submission from the IMVIA dated 9 July 2007. The theme of the IMVIA submission was that the proposed Rule would cause the average age of vehicles in the national fleet to increase and the scrappage rate to decrease, would not achieve the stated objectives of reducing pollution and improving air quality, would lead to an increase in harmful exhaust emissions, and would cause negative social effects including job losses and loss of mobility for the population, an effect which would especially target low income earners and those with large families.

[10] Noting that the draft Rule proposed that vehicle emission standards be implemented in stages, the IMVIA further submitted that the Rule should prescribe that a comprehensive review be conducted and consulted on before successive phases were implemented. It would be imprudent to proceed with successive phases of implementation without thoroughly analysing and reviewing the effects of previous stages.

[11] On 11 June 2007 the Cabinet Business Committee considered whether a rolling age ban should be adopted, in addition to emissions standards. A paper noted that the decision to implement emissions standards would act as a de facto age ban,

so achieving the desired goal of modernising the vehicle fleet. A formal age ban would supplement the standards, but it posed technical and operational difficulties. It was decided that a rolling age ban be should reconsidered after the emissions standards had been in force for three years.

[12] The Rule was signed into law on 27 November 2007 by the then Minister for Transport Safety, the Hon Harry Duynhoven. The IMVIA's plea for separate and successive Rule changes preceded on each occasion by further studies was rejected despite sustained lobbying in the interim; rather, the Rule provided for staged implementation.

[13] I record that the IMVIA does not allege any reviewable error affecting the making of the Rule; it complains rather that it was later promised a full review of the Rule's implementation before the third phase took effect but the Minister has since 2010 twice refused to conduct such review. I will mention the empowering legislation and the Rule itself before returning to the narrative dealing with the alleged review.

The Rule

[14] The Rule was made under the Land Transport Act 1998, under which the Minister has certain objectives, notably contributing to an integrated, safe, responsive, and sustainable transport system:

> **169 Objectives of Minister**
>
> The objectives of the Minister under this Act are—
>
> (a) to undertake the Minister's functions in a way that contributes to an integrated, safe, responsive, and sustainable transport system; and
>
> (b) to ensure that New Zealand's obligations under international agreements relating to land transport are implemented.

[15] Section 152 authorises the Minister to make what are called ordinary rules for all or any of a number of purposes, including environmental sustainability and land transport safety:

152 Power of Minister to make ordinary rules

The Minister may make rules (ordinary rules) for all or any of the following purposes:

(a) safety and licensing for any form of transport within the land transport system, including (but not limited to) technical requirements and standards:

(b) assisting land transport safety and security, including (but not limited to) personal security:

(c) assisting economic development:

(d) improving access and mobility:

(e) protecting and promoting public health:

(f) ensuring environmental sustainability:

(g) any matter related, or reasonably incidental, to any of the following:

(i) the Minister's objectives under section 169:

(ii) the Minister's functions under section 169A:

(iii) the Agency's objective under section 94 of the Land Transport Management Act 2003:

(iv) the Agency's functions under section 95 of the Land Transport Management Act 2003:

(h) any other matter contemplated by a provision of this Act.

[16] Under s 155, ordinary rules may prescribe standards for vehicles, including their emissions and environmental requirements.

[17] An ordinary rule must be signed by the Minister and contain a statement specifying its object and detailing any consultation which has followed publication of the Minister's intention to make it.[2] As a matter of practice the New Zealand Transport Agency follows a rule-making process with several phases, the third of which is mandatory and involves publishing a draft for public consultation. This process was followed when the Rule was made, as outlined at [9] above.

[18] The Rule sets out its objective:

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[2] Section 161.

> ... to progressively improve the emissions standards of vehicles entering the New Zealand fleet by requiring newly imported vehicles to have been manufactured to progressively increasing new emissions standards. For a given engine size, newer vehicles that are manufactured to newer technologies are also likely to be more fuel-efficient and this, in turn, will help to reduce the emissions of 'greenhouse' gases such as carbon dioxide.

[19] It also states that extensive consultation had taken place with affected industry groups, beginning in mid 2005, and summarises the principal steps in that process.

[20] The Rule specifies that its requirements must be met by a motor vehicle before it may be certified for entry into service in New Zealand for purposes of the Land Transport Rule: Vehicle Standards Compliance 2002. Section 2 of the Vehicle Exhaust Emissions Rule provides that, with certain exceptions, a vehicle to which the section applies, which includes petrol and diesel-powered motor vehicles, must have complied when manufactured or modified with an approved vehicle emissions standard specified in tables contained in Schedule 1.

[21] For my purposes it suffices to focus on the standards applicable to used petrol-powered motor vehicles made in Japan, which is the source of about 95 per cent of New Zealand's used vehicle imports. Table 2.1 of Schedule 1 prescribes the minimum emissions standards applicable to used petrol vehicles. For vehicles certified for entry into service between January 2008 and January 2009 the standards included Japan 00/02.[3] For those certified between January 2009 and January 2012 the standards were the same. But for those certified between 1 January 2012 and 1 January 2013 the minimum standards will be higher; they include Euro 4 or Japan 05. There are separate tables for new petrol vehicles and new and used diesel ones. I will ignore those standards because the application for review is concerned only with used petrol-powered vehicles. For ease of understanding I reproduce table 2.1 below:

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[3] Alternative standards are the corresponding standards applicable in Europe, the United States and Australia.

Certified for entry into service	Approved vehicle emissions standard	
	Used petrol, LPG and CNG vehicles	
	Light vehicles	Heavy vehicles
On or after 3 January 2008 and before 1 January 2009	ADR 79/00; Euro 2; Japan 98; US 2001	ADR 80/02; Japan 00/02; or US 98P
On or after 1 January 2009 and before 1 January 2012	ADR 79/01; Euro 3; Japan 00/02; or US 2001	ADR 80/02 Japan 00/02; or US 98P
On or after 1 January 2012 and before 1 January 2013	ADR 79/02; Euro 4; Japan 05; or US 2004	ADR 80/02; Euro 4; Japan 05; or US 2004

[22] It will be seen that there is presently no standard applicable after 1 January 2013. The Ministry anticipates that a new Rule will be made in 2012, but there are no proposals as yet.

Was the IMVIA promised a review of the Rule?

[23] The IMVIA's case that a review was promised turns on a letter of 6 October 2008 from the then Associate Minister of Transport, the Hon Judith Tizard, to David Vinsen of the IMVIA.

[24] Mr Vinsen contended in his first affidavit that the Associate Minister stated at a meeting with him that the Rule would be reviewed once it was in force to ascertain its effectiveness. He did not specify when the meeting was held, other than to say it was one of a number and was held in 2007, before the Rule was made. The Associate Minister has sworn an affidavit in response in which she said that the only meeting he might be referring to was held on 22 August 2007, and she is confident that she made no promise that the Rule would be reviewed. She may well have indicated that the industry would be involved in the Ministry's ongoing consideration

of data or evidence as and when it came to hand. Her account finds support in an affidavit from the official responsible for developing the policy behind the Rule, Ian McGlinchy, who attended the Associate Minister when she met Mr Vinsen. Minutes of the 22 August meeting were taken; they record no undertaking or assurance about a review. Mr McGlinchy pointed out that a review of implementation is not a trivial matter; it would necessitate a change to the Rule and a formal reference to Cabinet. Mr Vinsen responded in a reply affidavit that he met the Associate Minister on several occasions and was promised a review more than once.

[25] It is not in dispute that the IMVIA asked the Associate Minister to consider deferring the implementation of phase two. The Associate Minister's letter of 6 October 2008 was written in response to that request. She advised:

> I fully appreciate that these are difficult times for those in the used vehicle import and retail sector and I have sympathy for the individuals concerned. I have considered the merits of your request. However, even if the government was to agree to your request I have to advise that there is no mechanism available to me to amend the current Rule without going through the full Rule amendment process. As you would be aware, the Rule amendment process would take at least a year to carry out and presumably this would defeat the immediate purpose of your request.
>
> I understand you have already discussed the matter of a review of the implementation of the exhaust emission standards with the Ministry of Transport and requested advice under the Official Information Act. You will therefore be aware that Cabinet has agreed that the Emissions Rule will be reviewed three years after its implementation. I feel that any review before then would be premature. Eight months from its introduction is certainly too soon to be considering whether the Rule is meeting its stated objectives.
>
> Furthermore, following consultation on the Rule last year, in order to alleviate impacts on importers Cabinet agreed to delay the introduction of the Japan 00/02 standard until 2009 and allow the import of so called "GF" vehicles for a year longer than initially proposed. Even with this one-year deferral, the used-vehicle market is clearly struggling and sales are significantly down. I am informed that the Motor Trade Association estimated in the July edition of their "Shift" magazine that there were up to 10,000 vehicles imported but not sold at that point. This suggests that the difficulties faced by the industry are far wider than just the effects of the Rule. I am certainly not convinced that allowing even older vehicles into the country would necessarily be a panacea for your sector. Nor would it be good for the environment.
>
> I see that you have attached a six page document that appears to have been prepared by an external consultant showing that newer cars are more expensive. That is not exactly a surprising finding. As I noted at the time of

> the Rule introduction, the Rule itself does not affect the price of vehicles: it merely limits access to older vehicles, built to lower standards. The figures presented in the report are entirely consistent with the work presented in the Regulatory Impact Assessment for the Rule that estimated a 15 percent increase in price for each year a vehicle is newer.
>
> Taking these matters into consideration, even if a mechanism was available to me, I am not convinced that the request to defer implementation of the Japan 00/02 standard by a further year could be justified.

[26] In his first affidavit Mr Vinsen characterised the second paragraph of that letter as a promised review of the entire Rule, in particular the implementation of phase three. The response of the Associate Minister and Mr McGlinchy was that the review related to a rolling age ban, which was still under consideration at that stage. Hence the Associate Minister's reference to a Cabinet decision which she understood had been supplied to Mr Vinsen. That was intended to refer to the Cabinet Business Committee decision of 11 June 2007, in which the Minister had been directed to reconsider a rolling age ban after the emissions rule had been in effect for three years.

[27] Mr Vinsen met this evidence in his reply affidavit, contending that the emissions standard and the rolling age ban were quite separate work streams, the latter having nothing to do with the objective of the Rule. That drew a rejoinder from Mr McGlinchy in which he quoted an email exchange with Mr Vinsen on 2 September 2008. Mr McGlinchy explained in that exchange that in mid-2007 Cabinet had decided not to proceed with a rolling age ban but would reconsider such ban after emissions standards had been in force for three years. I observe that Mr Vinsen replied to the email, noting that the IMVIA had been "quite vehement (to no avail) about the need for a review of the effects of each phase of the Rule" before later phases were implemented.

[28] As is customary in judicial review, there was no cross-examination.

[29] I am not prepared to resolve the factual conflict in the IMVIA's favour. On the contrary, the evidence suggests that no review of the implementation date was ever promised, for several reasons. First, the claim must be set in context. The IMVIA's plea for successive rule changes was considered and clearly rejected in the Rule itself. The Minister had decided that the Rule gave the industry enough time to

adapt to the Japan 05 standard. The June 2007 Cabinet minutes made it clear that the only question remaining was whether additional reforms were required. No one reading the minutes, as it appears Mr Vinsen had done, could be under any illusion about the final nature of the decision that had been taken.

[30] Second, the Associate Minister used the term "review" in her letter, but it is a flexible concept, well capable of accommodating Cabinet's direction that the Rule be examined in three years time to decide whether a rolling age ban was also required. The email exchange of 2 September 2008 makes it quite clear that Mr Vinsen understood what review was being referred to. I was referred to no other Cabinet decision that there would be a review in three years. I accept that the Associate Minister did not rule out a general review, but neither did she promise one. She was non-committal about that. Her point was that there would be no earlier review.

[31] Third, the highest that Mr Jones could put it was that the Associate Minister promised to review the Rule to see whether its objective was being met, but the Rule's objective is not that of protecting the industry or ensuring that consumers retain access to low-cost vehicles, which are the IMVIA's goals. Whatever the underlying policy considerations that resulted in the Rule taking its present form, its immediate objective is that of progressively improving the emissions standards (and incidentally, fuel efficiency) of vehicles entering the New Zealand fleet. A delay in implementation is not likely to achieve that objective.

[32] Fourth, the only formal meeting at which a significant commitment to review the policy, and if necessary change the Rule, might reasonably have been expected was that of 22 August 2007, but the minutes record no such discussion. Nor do minutes of another casual meeting produced by the Associate Minister. I note a distinct lack of specificity in Mr Vinsen's evidence about when the promise was made and in just what terms. He says she used words to the effect of "[o]f course we'll review the Rule; we wouldn't just keep on implementing successive phases if it wasn't working." He points to no contemporaneous records supporting his account of what was said, however, and such records as have been produced tend to contradict him.

[33] I do accept that Mr Vinsen regularly sought out politicians, the IMVIA having done its best to make a political issue of the Rule. Indeed, his efforts earned him a dressing down from the then Prime Minister at a function on 9 November 2007, shortly before the Rule was made. But it is implausible that so specific and important a commitment would be given at an informal meeting. By way of illustration, at the function I have just mentioned Mr Vinsen pressed the Prime Minister to revisit the Rule, expressing a fear that Cabinet would tighten the draft Rule and stating that once the Rule was made it would be "game over". He cannot have taken any comfort from her response, which as recorded in the notes made by accompanying officals was at once non-committal and hostile.

[34] Finally, I explain in the next section of this judgment that not until much later, in May 2011, did Mr Vinsen first suggest an existing commitment to the IMVIA. At that time he did not speak of a commitment to review implementation dates, but only suggested that the previous Government had stated an intention to review the effects of the Rule before implementing subsequent phases. In the interim the Minister's successor had publicly affirmed in August 2009 that the timetable would not change.

The current Minister's refusal to amend the Rule

[35] The general election of 2008 saw a change of government. The current Minister, the Hon Steven Joyce, took office on 19 November 2008. He deposes in an affidavit to receiving requests from used motor vehicle dealers for a review. He has also found it necessary to amend the Rule from time to time to deal with a variety of issues, including most notably the standards to be applied to new heavy diesel vehicles. In order to attend to these matters he has periodically taken advice from the Ministry. For example, in a paper of 5 February 2009, officials noted that imports had been declining since 2003 but emissions standards were only one possible cause; other and more significant developments were the unavailability of easy credit following finance company collapses, competition from other nations such as Russia for used Japanese vehicles, and adverse exchange rate movements. Claims that emissions standards would result in fewer old vehicles being scrapped were not borne out by the evidence.

[36] In July 2009 the IMVIA sought a review, with the aim of deferring implementation indefinitely. It did not suggest that there was an existing commitment to conduct a review. The Minister was briefed, and decided in August 2009 not to make any substantive changes to the Rule. That decision was announced in a media release of 28 August:

> "Emissions standards are important for ensuring we are in step with the rest of the world in reducing harmful exhaust emissions," says Mr Joyce.
>
> "The government has received correspondence both for and against this issue, with new vehicle importers and vehicle user representatives favouring the current timetable," says Mr Joyce.
>
> "On balance, and to provide certainty to the industry as a whole, we have decided not to delay the existing timetable. This will retain the current balance of responsibility for harmful emissions between new and used vehicle importers."

[37] Following that statement the Minister continued to receive requests from individual dealers, but he heard nothing from the IMVIA until October 2010, when he received a submission from Mr Vinsen requesting a review of the implementation of phase three of the Rule. In that submission the IMVIA contended that the number of used vehicles imported in 2012 would fall by as much as 50 per cent to about 45,000 to 60,000 units as a direct result of the new standard. Sales had suffered from the economic downturn and businesses had been forced to retrench. The environmental costs of a suggested two-year delay on emissions would be minimal; on the contrary, the Rule would postpone upgrading of the fleet by making vehicles more expensive. Against that, a delay in implementation would stabilise prices and give the industry a breathing space. The submission pointed out that the IMVIA had always urged that the Rule be reviewed before later phases were implemented, but it did not suggest that any commitment had been made.

[38] The Minister found the IMVIA's claims about the dire effect of emissions standards unconvincing. He relied on updated advice in which officials noted that since 2001 the IMVIA had consistently predicted the collapse of the industry every time that minimum standards (relating to seat belts, frontal impact and emissions) were imposed, yet the trade continued. The Minister responded to the IMVIA on 22 December 2010, stating that he had given the matter further consideration and decided to leave the Rule unchanged. He doubted that the Rule was solely

responsible for fluctuations in used vehicle imports, noting that new vehicle sales had followed a similar path. It was also important to maintain certainty for both used and new motor vehicle dealers by maintaining the current balance of responsibility for emissions:

> As you are aware, in 2009 I considered whether it was appropriate to delay any of the requirements set out in the Rule. I stated at that time that the decision to leave the Rule unchanged was to give certainty to your industry. However, as requested in your submission I have given the matter further consideration. On balance, I have to confirm my earlier decision and leave the Rule unchanged.
>
> I note that in making your case for a delay to the introduction of the Japan 05 standard, you argue that the Rule "causes severe fluctuations in the number of used vehicles imported". While there is little doubt that the introduction of the earlier requirements in the Rule must have had some effect on the ability of importers to obtain stock, it is far from clear what that effect was. If the Rule had been the only cause of the changes in the number of used vehicles imported since 2008, then I would not have expected to see the volume of imports of new vehicles following an almost identical path to used vehicles.
>
> You write that you project volumes of used imports will fall by as much as 50 percent in 2012 if a range of conditions, such as the exchange rate and the Japanese economy, stay fixed. The problem with this statement is that it is unrealistic to expect that these conditions will stay fixed. Also, as you observe, many factors affect the volumes of imports. If the recent economic turmoil has told us anything about the used vehicle market, it is that past buying patterns are not likely to be a good indicator for what can be expected in 2012.
>
> As I have said on a number of occasions, I have considerable sympathy for the difficult trading conditions being faced by the motor vehicle sector over the past few years. However, I think it is important to retain the current balance of responsibility for harmful emissions between new and used vehicle importers and provide certainty to the industry as a whole.

[39] This is the first of two decisions that are the subject of the application for review.

[40] As a result of continued pressure from used vehicle importers, on 3 May 2011 the Minister requested an up-to-date briefing on the Rule's impact on used petrol vehicle imports. He then received a letter of 6 May from the IMVIA which was also referred to officials. In that letter Mr Vinsen urged another review, pointing among other things to the Japanese earthquake which had severely restricted supply of new and used vehicles. For this and other reasons, the New Zealand industry could not

source affordable stock. Mr Vinsen also repeated the IMVIA's arguments that the Japan 2005 standard would only marginally improve emissions, and would lead to New Zealanders retaining older cars and scrapping fewer of them. He stated that the previous government had said the Rule would be reviewed:

> The previous government stated their intention to review the effects of the Rule before implementing subsequent phases, and we now submit that the implementation of the next phase of the Rule be deferred.

[41] The advice eventually received was dated 10 June 2011. Officials reviewed the position in some detail. They accepted that the used vehicle import industry was struggling, but they did not think it necessary to undertake a detailed economic analysis, for it was clear that the new standard would have little effect on the New Zealand vehicle fleet. The industry's problems were attributable to other causes, principally economic conditions.

[42] The Minister met IMVIA representatives on 23 June 2011. He made it clear that he was not inclined to delay implementation, but it was agreed that further information would be supplied by the IMVIA relating to the price effects of the Rule. He also met with representatives of the Motor Industry Association, which represents new car dealers. Their position was that the IMVIA was overstating the impact of the new emissions standards on prices. That was confirmed by advice from officials received on 14 July. Officials considered that the standard might reduce consumer choice but it should not affect prices, and used vehicle dealers were suffering the effects of other changes, notably shifting buying patterns in Japan.

[43] The Minister accepted the officials' advice, and advised the New Zealand Herald on 18 July 2011, in response to a media inquiry, of his decision not to change the Rule. He wrote to Mr Vinsen on 17 August, stating:

> I have considered your further correspondence and as I have said now on many occasions, I have considerable sympathy for the difficult trading conditions being faced by the motor vehicle sector over the past few years. I am aware that factors such as the general state of the economies in both Japan and New Zealand, along with the tragic earthquakes in both countries are having an effect on vehicle sales. On balance though, I still consider that it is not necessary to review the existing requirements of the Land Transport Rule: Vehicle Exhaust Emissions 2007 (the Rule) for used vehicles.

> I am aware of your estimates of the possible effects on your sector from the requirements of the Rule. However, I am mindful that your organisation has predicted the demise of used vehicle imports on a number of previous occasions. Instead your members have proven to be resilient and adaptable. It is these properties that make me confident that your members will manage the 2012 requirements as they have managed the previous requirements of the Rule. It is worth repeating that other organisations in your sector are equally adamant that the 2012 requirements need to remain in place, in order to maintain certainty for importers.
>
> I hope that my position does not come as a surprise to you or your members. I have advised you on several occasions since I became Minister that I did not intend to amend the Rule. I have also said that it was important to give your members certainty so they could plan to manage this requirement. After all, your members and the wider industry have known since January 2008 that this next phase of the Rule would be implemented in 2012.
>
> My officials advise me that they have looked at your claims around the effects of a reduction in the imports as a result of the Rule's requirements. They have found that any change in imports of used vehicles as a result of this requirement is unlikely to have an effect on variables such as scrappage or average age.
>
> I have noted your comment that the previous administration had said that there should be a review of the effects of the Rule around this time. While I am advised that Cabinet did ask for a review, I understand that the context of the request was to determine whether a rolling age ban was needed, in addition to the requirement for minimum emissions standards. There is nothing in the decision that suggests Cabinet intended the review to look at anything wider than the age of vehicles being imported.
>
> I also understand that the discussion at that time was in the context of introducing a seven year age ban. Given that the average age of used petrol vehicles entering the fleet in the first quarter of 2011 was 8.8 years, any such review may actually conclude that more, rather than fewer, controls would be required. On this basis I am not sure that there is any merit in a review proceeding at this time.

[44] This is the second of the two decisions that are the subject of the application for review.

The application for review

[45] The IMVIA's position is that the object of the Rule and the legislation would be met if the time lag for adoption of emissions standards for used vehicles were to be extended by two years. Unless that is done, explains Mr Vinsen, the Rule will preclude the importation of used vehicles in the sought-after $10,000-$12,000 band, which is described as the "sweet spot of affordability". It is said that the new

standard effects no practical improvement in emissions standards but severely limits the range of vehicles which may be imported.

[46] The application for review alleges that the Minister has both a statutory power to review the Rule and, in the circumstances, an obligation to do so arising from a legitimate expectation created by his predecessor. The review must consider whether the implementation of phase three on 1 January 2012 (as opposed to a later date), is in accordance with the objectives prescribed in the empowering legislation, and would have the claimed effect of improving emissions levels and safety, and otherwise remains an appropriate implementation date having regard to the impact of the Rule on the industry, the community and the environment. The application pleads that no review has been undertaken, the Minister has pre-determined his decisions and not given proper consideration to submissions, and the stated reasons are both invalid and inadequate. The implementation of phase three is said to be ultra vires in that it is "anti-consumer", "anti-environmental", uneconomic, a de facto trade restriction, and contrary to the stated purposes of the Rule and the empowering legislation.

[47] In argument, Mr Jones QC sensibly focused on the IMVIA's legitimate expectation of a review and the claim that no real review has yet been conducted. I will do the same, these being the only grounds with any prospect of success. In particular, it cannot be said that the Rule was or is unreasonable in the *Wednesbury* sense. The Court will not embark on an evaluation of the IMVIA's claim that emissions will worsen under the new standard as consumers retain older vehicles past the point where they would normally be scrapped. Nor will it balance the alleged environmental benefits against the effect of new standards on market prices and scrappage rates. These are questions of degree and judgement, going to the substantive merits of the Rule, and it is clear both that they have been evaluated and that the IMIVIA's claims are controversial.

[48] None of the allegations is admitted. The Minister further says that the Court cannot make him embark on policy formation, and anyway he has reviewed the Rule more than once, taking into account as he did so all that has been said by the IMVIA.

Jurisdiction

[49] Mr Dempster contended that no statutory power is engaged here. None has been exercised, nor has the Minister refused to exercise a power in the face of a duty to do so. The application rather seeks to force the Minister to make policy with a view to subsequently exercising his rule-making power. Mr Dempster accepted that such a power might be reviewable in rare circumstances, such as bad faith, but this is not such a case.

[50] Mr Jones responded to this submission in various ways, none of which I found persuasive. For example, he contended that it is implicit in the Rule's staged implementation that a power is being exercised whenever a new phase is being implemented, and that the Minister has effectively exercised the power by refusing to amend the Rule.

[51] I accept Mr Dempster's submission that the rule-making power is not directly engaged here. Rather, the IMVIA challenges the Minister's refusal to revisit the policy underlying a previous exercise of the power. It cannot be the case that the Minister must conduct a formal review whenever an interested party wants one. In the absence of a duty to exercise the power, it is by no means obvious that the IMVIA can point to a reviewable decision for purposes of the Judicature Amendment Act 1972. Further, the decision to implement an emissions rule, or not, involves questions of high policy which the Court ordinarily will not review.[4] However, it is arguable that even in such circumstances the Minister may create a legitimate procedural expectation which the Court will enforce. The point was not squarely addressed in argument. Fortunately, I need not rest my decision on the jurisdiction ground.

Legitimate expectation

[52] I will assume that in these circumstances the Associate Minister might have so conducted herself as to create a reasonable expectation that a review would be

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[4] *Attorney-General v Unitec Institute of Technology* [2007] 1 NZLR 750 (CA) at [51].

conducted.[5] However, an unambiguous promise is normally required. Otherwise, it would not be reasonable for anyone to rely on the alleged representation.[6]

[53] For the reasons given above, I am satisfied that no such unambiguous promise was given. The Associate Minister indicated that a review would be held, but she did not commit herself to it. Further, the only expectation that the IMVIA might have had of a three-year review was that it might add a rolling age ban to the emission standard. I am unable to accept that IMVIA members did rely, or might reasonably have relied, on such review being held at all, still less on it including the implementation date.

Any expectation has been met

[54] In any event, I accept Mr Dempster's submission that more than one review of the phase three implementation date has been conducted by the current Minister, who considered submissions from the IMVIA and took advice from officials. Mr Jones could point to no issue that had been overlooked in the two challenged decisions. The most he could say is that more detailed analysis might yet be done.

Predetermination

[55] In his written submissions, which I did not understand him to abandon on this point, Mr Jones argued that the Minister predetermined the two challenged decisions by making it clear beforehand that he had no intention of delaying phase three. I am not persuaded, however, that the Minister's mind was closed to the evidence.[7] He took advice on each occasion and the evidence is that he considered it, seeking further details in response to what officials or the IMVIA said. He evaluated new considerations such as the impact of the Japanese earthquake. The decisions reached were consistent with the advice he received.

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

6 *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [143]-[146].

7 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA); *Wool Board Disestablishment Co ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [272].

It is too late, in any event

[56] I accept Mr Dempster's submission that in any event, it is too late to review the implementation of phase three. The new standard will take effect before any review could be completed; indeed, a review could barely get under way before 1 January 2012. A new Rule will be developed in 2012, giving the IMVIA an opportunity to press its case for relaxed standards. Participants in the new and used car markets must have made commitments in reliance on the new standard; for example, it was suggested that IMVIA members have stockpiled cars.

Decision

[57] The application for review is dismissed.

[58] The Minister is entitled to costs on a 2B basis with provision for two counsel. Memoranda may be filed if counsel cannot agree.

Miller J

Solicitors:
Cook Morris Quinn, Auckland for Plaintiff
Crown Law Office, Wellington for Respondent