

THE SCOPE OF JUDICIAL REVIEW: WHO AND WHAT MAY BE REVIEWED

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Introduction

This area is notorious for its terminological multiplicity and confusion. When discussing the concept of justiciability in the Australian context, Finn alludes to the confusion that exists about terms such as “jurisdiction”, “justiciability”, and the “limits of public law”:⁸⁰

There is a complex relationship between questions of jurisdiction, justiciability and the limits of public law. At common law, these concepts are particularly difficult to separate. However, they remain analytically distinct. First, the outer limits of public law and its attendant remedies have traditionally been set by the public/private divide. Judicial review has been held to be available to remedy abuse of statutory and prerogative powers, but not abuse of contractual or other common law powers by the Crown. The latter powers are not unique to the Crown and any remedy for their abuse is said to lie in private rather than public law. In this sense, exercises of contractual power and other private law powers are sometimes said to be ‘non-justiciable’ at public law. But this is misleading for two reasons. First, misuse of such powers remains justiciable at private law. Private law remedies are potentially available. Second, ‘non-justiciability’ is a narrower concept than ‘public power’. The mere fact that a power is classified as ‘public’ rather than ‘private’ does not entail its justiciability. Many prerogative, and arguably even some statutory, powers are still viewed by the courts as non-justiciable.

The jurisdiction of the courts is also a separate concept. This is most evident when that jurisdiction is conferred by statute, such as the Federal Court’s jurisdiction conferred by the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). ... Where jurisdiction is conferred by common law, it is likely to be coterminous with the limits of public power described above.

These three concepts combine to set a preliminary question in any judicial review application: is the decision capable of being reviewed by judicial review? It is important though to remember that that question has two quite distinct sub-questions:

- first, does the court have **jurisdiction** to review the particular decision?

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⁸⁰ Chris Finn, “The concept of ‘justiciability’ in administrative law” in Matthew Groves & H P Lee, *Australian Administrative Law: Fundamentals, principles and doctrines* (Cambridge University Press, Cambridge, 2007) 143, 144.

- secondly, assuming the decision is reviewable, is the decision **justiciable**?

As will be seen, the courts have sometimes fudged the distinction between these inquires or not made it clear whether their rationale for non-intervention is a jurisdictional concern or non-justiciability concern.

Consistent with the approach adopted elsewhere,⁸¹ this paper addresses the net effect of those questions by organising the types of decisions into a matrix combining both institutional and functional perspectives:⁸²

	<i>institutional</i> (decision-maker is public or private)	
<i>functional</i> (decision is public or private)	<i>Public</i> decision-makers making <i>public</i> decisions	<i>Private</i> decision-makers making <i>public</i> decisions
	<i>Public</i> decision-makers making <i>private</i> decisions	<i>Private</i> decision-makers making <i>private</i> decisions

Questions of jurisdiction and justiciability have traditionally been explored through this matrix. The demarcation between public and private has tended to be addressed by marshalling the cases into their respective categories according to the outcome of the judicial inquiry, with the implicit corollary that the categories will serve as analogues for later cases. To a certain degree, we continue that tradition by later discussing the cases organised in a similar fashion.

Before doing so, however, we think it important to discuss some of the difficulties with the public–private demarcation and to record some caveats about the nature of the inquiry. Also, as others have noted,⁸³ questions such as this raise the full gamut of contextual factors; the outcome will depend on “a careful analysis of the nature of the decision-maker and of the subject matter (nature) and surrounding circumstances of the decision”.⁸⁴ The outcome tends to depend on an overall evaluative judgment or assessment of these factors, not formalistic application of precedent.

⁸¹ Paul Radich and Jessica Hodgson, *Public Law* (NZLS, Wellington, August 2006) page 18; McGechan on Procedure (Brookers, Wellington, 1995-) para HR622.Intro.07.

⁸² We expand on this terminology below. See text at n 95.

⁸³ Radich and Hodgson, above n 81, 18.

⁸⁴ Ibid 18.

Preliminary questions and caveats

Public vs private: a loaded and illusory distinction?

As foreshadowed above, fundamental to the consideration of these issues is the demarcation between the public and private sphere.⁸⁵ In general terms, public functions are subject to public law standards and mechanisms; private activities are subject to private law expectations and remedies. Although rarely if ever acknowledged in judicial decisions mustering administrative decisions into their respective spheres, the judgment between the two is loaded and (arguably) illusory.

First, public functions or private activities are not necessarily self-evident. As Cane observes:⁸⁶

[F]unctions do not come labelled as ‘public’ or ‘private’. Nor is publicness like redness – a characteristic that can simply be observed.

The assessment about whether something is public or private, especially at the margins, is inherently a value judgment.

Secondly, that value judgment is essentially a political – not nonpartisan – one. Searching for a universal or single, “correct” answer about whether a function is inherently public or governmental is ultimately futile. Our experience demonstrates that the activities of government vary, over time and throughout the world.⁸⁷

[I]n different countries and at different times, the provision of health care, housing, education, and other ‘essential’ services such as electricity and transport, has been subject to varying degrees of public ownership and control.

This point is made strongly by Harlow and Rawlings, who condemn the failure of most public and administrative law texts to admit the relationship between law and political science.⁸⁸ They suggest the idea of law as “apolitical, neutral and independent of the world of government, politics and administration” is deeply rooted in our constitutional and legal theory.⁸⁹ As an exemplar, they point to the Rule of Law concept that law is “somehow neutral and impartial, ‘above’ both ruler and party politics” as being grounded in the classic liberal ideal of the state as one with limited functions, acting simply as a neutral arbiter between its constituents.⁹⁰ Taking the position that the legal system forms part of the wider political scene, they argue that:

[b]ehind every theory of administrative law there lies a theory of the state.⁹¹

Like Cane, they undertake a historic and comparative analysis of the various functions that have been undertaken by government, particularly highlighting the shifts in functions

⁸⁵ See Mark Freedland, “The Evolving Approach to the Public/Private Distinction in English Law” in Mark Free1 and Jean-Bernard Auby (eds) *The Public Law/Private Law Divide* (Hart Publishing, Oxford, 2006) 93. Also, see generally, the excellent collection of essays in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, Oxford, 1997).

⁸⁶ Peter Cane, *Administrative Law* (4 ed, Oxford University Press, Oxford, 2004) 17.

⁸⁷ *Ibid* 17.

⁸⁸ Harlow and Rawlings, *Law and Administration* (2 ed, Butterworths, London, .1997) 2.

⁸⁹ *Ibid* 2.

⁹⁰ *Ibid* 3.

⁹¹ *Ibid* 2.

in the United Kingdom – from the residual or nightwatchman state to the cradle-to-grave welfare state, from bureaucratisation and corporatisation to privatisation and decentralisation, and so forth.⁹² Most people will be familiar with our similar, indigenous history and the major shifts in the size of the state and its functions.⁹³ The complexity of the public–private definitional question has also been exacerbated by the “hybridization” where an agency may operate a mixture of activities, both traditionally public and traditionally private activities.⁹⁴ A binary approach to the question may therefore be unrealistic.

Of course, the courts have not ignored these major changes. In an attempt to address the vicissitudes of the nature of the state, the courts – and administrative law generally – have changed their perspective:⁹⁵

[T]he focus [has] shifted from controlling the institution of (central and local) government to controlling the functions of governance (whatever they may be) whether performed by government or non-government entities.

The different focus has also been described in the following ways:⁹⁶

- an **institutional** approach: reviewability depending on the formal identity of the impugned body (is it an organ of the state?) or on the source of power (does it come from statute or common law?);
- a **functional** approach: reviewability depending on the substance and nature of the decision (is the function a public or governmental function?);
- a **contextually functional** approach: reviewability depending on a combination of the two former approaches.

It may be difficult to distinguish between the latter two functional approaches. It seems fair to say that our courts have been reluctant to entirely eschew institutional considerations when assessing these matters;⁹⁷ the contextually functional label might therefore be a more apt description of current methodology.

The functional (or – probably more accurately – contextually functional) approach has also been explicitly adopted by the legislature for determining the reach of the New Zealand Bill of Rights Act 1990. Section 3 frames the application of the Bill of Rights in two complementary institutional and functional limbs:

s 3 Application

This Bill of Rights applies only to acts done—

⁹² Harlow and Rawlings, above n 88, 9-25. See also Cane, above n 86, 17.

⁹³ See, for example, Janet McLean, “New Public Management New Zealand Style” in Paul Craig and Adam Tomkins, *The Executive and Public Law* (Oxford University Press, Oxford, 2006) 124 and Derek Gill, “By Accident or Design: Changes in the Structure of the State of New Zealand” (2008) 4 Policy Quarterly 27.

⁹⁴ See Cane, “Accountability and the Public/Private Distinction” in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Oxford University Press, Oxford, 2003) 269 drawing on C Scott, “The Juridification of Relations in the UK Utilities Sectors” in Black, Michliniski, and Walker (eds), *Commercial Regulation and Judicial Review* (Oxford, Hart, 1998) 46.

⁹⁵ Cane, above n 86, 5.

⁹⁶ Ibid 3-7; Cane, “Accountability”, above n 94.

⁹⁷ See our discussion of the case law below.

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The scope of the “public function” test in this section is not directly discussed here, although some of the sentiments expressed about the problematic nature of the inquiry will be relevant. Although there are strong similarities between the contextual analyses mandated by s 3(b) and administrative law principle at common law, the courts have been reluctant to formally equate the two enquiries.⁹⁸ Whether they are correct to issue this caution is a moot point.

Thirdly, some also question whether it is helpful to try and analyse the public–private divide in terms of one single dimension. For example, Freedland suggests a “multi-dimensional” dynamic, where questions of public and private law are better viewed according to a trilogy of dimensions:⁹⁹

- the **jurisdictional** dimension: where the “persons, institutional, activities or functions to which public and private law respectively apply” are identified;¹⁰⁰
- the **procedural** dimension; where the “processes of regulation ... through which public and private law are implemented” are distinguished;¹⁰¹
- the **doctrinal or substantive** dimension: where the “rules and principles which are specific respectively to public and to private law” are identified.¹⁰²

His point is helpful to remind us that the jurisdictional question is only one part of the equation. Perhaps the more important focus is the rules or standards that will apply to bodies if we treat them as falling within the public law jurisdiction.

There are, of course, substantial differences between the expectations placed on bodies at public and private law. While a few quibble with this – most notably, Dawn Oliver, who suggests the values underlying public and private law and the principles that regulate each sphere are essentially the same¹⁰³ – the legal regimes applying to public and private law are different. And with good reason, as explained by Cane’s thumb-nail sketch of the well-known arguments:¹⁰⁴

First, because institutions of governance have the job of running the country they must have some functions, powers, and duties which private citizens do not have; obvious examples are the waging of war and the issuing of passports. Secondly, because of the very great power governmental institutions can wield over its citizens (most particularly

⁹⁸ For example, Randerson J in *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, para 69 said: “Whether the entity is amenable to judicial review is not necessarily decisive [to the s 3(b) inquiry] and some care needs to be taken in applying decisions from that context....”.

⁹⁹ Ibid 108.

¹⁰⁰ Ibid 108.

¹⁰¹ Ibid 108.

¹⁰² Ibid 108.

¹⁰³ Dawn Oliver, “The Underlying Values of Public and Private Law” in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) and Dawn Oliver, *Common Values and the Public–Private Divide* (London: Butterworths, 1999).

¹⁰⁴ Cane, above n 86, 13.

because government enjoys a monopoly of legitimate force), we may want to impose on them special duties of procedural fairness that do not normally apply to private citizens, and special rules about what organs of governance may do and decide. Thirdly, because certain institutions of governance have a monopoly over certain activities and the provision of certain goods and services, it might be thought that the exercise of such powers ought to be subject to forms of ‘public accountability’ to which the activities of private individuals are usually not subject.

Fourthly, because the courts are themselves organs of governance (i.e. they perform public functions), the view they take of their proper role when dealing with the exercise of public power is different from the way they view their role in relation to purely private matters. In relation to the affairs of private citizens the courts are the primary organs for interpreting, applying, and enforcing the law. By contrast, when they are dealing with matters involving other organs of governance the courts take a more restrained view of their role. ...

A fifth reason for distinguishing between public and private law arises out of the fact that although governments have certain distinctive functions (such as national defence), many of the things they do are also done by private citizens. Governments make (and sometimes break) contracts just as private individuals do; governments own property in the same way as private citizens; governments also sometimes commit torts. The relevant bodies of law – the law of contract, tort, and property – are central areas of private law, developed to regulate dealings between citizen and citizen. Should these regimes of private law apply equally to government contracts, government property, and government torts, or should there be a law of public contracts, public property, and public torts? [T]he answer which the courts have given to this question is neither an unqualified ‘yes’ nor an unqualified ‘no’.

To these arguments, one might add the diametrical nature of freedom at public and private law. As Laws J said in *R v Somerset County Council, ex parte Fewings*:¹⁰⁵

For private persons, the rule is that you may do anything you choose which the law does not prohibit. ... But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law.

These caveats combine to highlight the importance of asking the proper question. Searching for the answer of whether something is inherently public, in a descriptive sense, may be pointless. The more meaningful inquiry is a normative one: is the decision one which should be subject to public law principles? The differences between the two enquiries may be subtle but is crucial. The latter, normative inquiry exposes the value judgment that underlies the public–private divide. As Cane notes, the important point is that this judgment is:¹⁰⁶

¹⁰⁵ *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513, 524. Compare *R v Ngan* [2008] 2 NZLR 48.

¹⁰⁶ Cane, above n 86, 18.

... not about whether particular functions are public or private but about whether accountability for the performance of particular functions should follow public or private law rules and principles.

Finally in Freeland's language, the doctrinal or substantive dimension should not be ignored. And, of course, it should not be assumed that administrative law supervision is identical across the range of actors or decisions it regulates. It is clear that the doctrines (or intensity or standards of review) are sympathetic to the differing nature of the decision-maker and types of decisions.¹⁰⁷ The jurisdictional and doctrinal perspectives may either work in tandem – a bold assertion of public law jurisdiction may be ameliorated by a more deferential approach to review – or may exacerbate concerns about the reach of public law – public law jurisdiction is asserted in a marginal case and principles of good administration designed for core public actors may be aggressively applied.

Jurisdiction: the relationship between JAA72 review and common law review

There are two main procedural vehicles for judicially reviewing a decision:

- section 4 of the Judicature Amendment Act 1972 (sometimes called “**statutory or JAA review**”);
- one of the prerogative writs, available under Part 7 of the High Court Rules (sometimes called “**common law review**”).

In addition, a decision may be challenged according to administrative law or judicial review proceedings collaterally in other proceedings, such as a prosecution or private law claim.¹⁰⁸

The (mis-)application of the procedural rules set by the JAA72 – particularly their interface with common law review – have complicated the public–private divide analysis and led to judicial review jurisdiction being asserted in inappropriate circumstances, without any genuine public–private domain analysis.

(a) Prerogative writs

The long-standing prerogative writs which provided the basis for reviewing administrative decisions for many years remain. Preserved – in a procedural sense – by Part 7 of the High Court Rules, the prerogative writs (and other similar extraordinary remedies) provide a suite of specific remedies for addressing the misuse of public power.¹⁰⁹

¹⁰⁷ See Dean R Knight, "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL 117 and Radich and Hodgson, above n 81, 14-17.

¹⁰⁸ See Dean R Knight, "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 117.

¹⁰⁹ Injunctions and an application for removal from office are not prerogative writs, with the term being restricted to mandamus, prohibition, certiorari, and habeas corpus (now dealt with under the Habeas Corpus Act 2001 and required to be made by way of originating application under part 4A of the High Court Rules). See Woolf, Jowell & Le Sueur, *de Smith's Judicial Review* (Thomson, London, 2007) 780 ff and Joseph, [*Constitutional and Administrative Law in New Zealand* (3 ed, Brookers Wellington, 2007) 1058 ff].

Writ	Rule	Reviewable decision-maker	Power
mandamus	rule 623, HCR	<ul style="list-style-type: none"> - inferior Court - tribunal - person 	compel decision-maker to perform public duty
injunction	rule 624, HCR		restrain decision-maker from breaching duty
prohibition	rule 625, HCR		prohibit decision-maker from exercising jurisdiction
certiorari	rule 626, HCR	<ul style="list-style-type: none"> - inferior Court - tribunal - person exercising statutory or prerogative power - person exercising power that affects the public interest 	review determination and quash or vary it
removal from office	rule 627, HCR	- person holding public office	remove from office
declaration	Declaratory Judgments Act 1908	n/a (consideration of the validity, legality, construction, or effect of statutes and various other instruments or agreement)	declaration of validity, legality, construction, or effect

Part 7 provides an expansive portal, allowing an applicant to seek the prerogative writs in the widest possible range of circumstances. The identification of the reviewable bodies are framed broadly:¹¹⁰ “person” has a broad, inclusive meaning;¹¹¹ the words accompanying reviewable person for the *writ of certiorari* are wide enough to present no substantive impediment to the availability of the writ. Therefore the (substantive) jurisdiction of Part 7 of the High Court Rules is determined according to the judicial review jurisdiction at common law.

But the prerogative writs have proved cumbersome for applicants and provided no sympathy for applicants seeking the wrong writ (somewhat problematic in a jurisdiction known for its remedial discretion¹¹²). Hence the procedural reform of the writs in the 1970s and the introduction of the simplified judicial review procedure in the JAA72. There was some expectation or hope that these writs would become redundant, with the JAA procedure becoming the ordinary means of reviewing administrative action.¹¹³ As can be seen, that is not necessarily the case. Presently, the Law Commission is subjecting the writs to review again, with a discussion paper having been released.¹¹⁴

¹¹⁰ Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 1058. Further refinement and simplification of these rules has been proposed as part of the Rules Committee's High Court Rules Revision Projects; see www.courtsfnz.govt.nz/about/system/rules_committee/revision.

¹¹¹ The term "person" is not defined in the High Court Rules or Judicature Act 1908. However, s 29 of the Interpretation Act 1999 defines a person to include "a corporation sole, a body corporate, and an unincorporated body".

¹¹² John Caldwell, "Discretionary Remedies in Administrative Law" (1986) 6 Otago LR 245.

¹¹³ Public and Administrative Law Reform Committee *Administrative Tribunals Constitution, Procedure and Appeals (Fourth Report)* (Wellington, Government Printer, January 1971) para 26.

¹¹⁴ Law Commission, *Review of Prerogative Writs* (IP 9, Law Commission, Wellington, August 2008).

(b) Judicature Amendment Act 1972

Section 4 of the JAA72 provides:

4 **Application for review**

(1) On an application which may be called an application for review, the High Court may ... by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.

In general terms, s 4 provides a simplified procedural vehicle for reviewing decisions made under a statutory power (as defined widely in s 3, a point addressed later). In most cases, the ambit of JAA72 review will be wide enough to cover the bread-and-butter judicial review applications being commenced – particularly as most modern-day decision-making takes place pursuant to statutory authority. Indeed, this was the intention of the drafters of the JAA72, namely, to provide an easy, simplified procedure for reviewing the generality of administrative decisions.

For present purposes, there are two central phrases that operate to circumscribe the jurisdiction of the High Court on judicial review under the JAA72:

- “exercise by any person of a statutory power”;
- “any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction”;

(c) Statutory power and statutory power of decision

The first phrase has tended to be the focus in most cases where there has been a genuine issue about the scope of the High Court’s supervisory jurisdiction. Section 3 defines “statutory power” expansively:¹¹⁵

Statutory power means a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate—

(a) To make any regulation, rule, bylaw, or order, or to give any notice or direction having force as subordinate legislation; or

(b) To exercise a statutory power of decision; or

(c) To require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing; or

(d) To do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; or

¹¹⁵ The breadth of the definition was significantly extended in 1977 by the addition of the words, “or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate”: Judicature Amendment Act 1977, s 10(1).

(e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person:

The critical phrase in the definition, “statutory power of decision”, is further defined (probably unnecessarily repeating the introductory wording from its parent definition):

Statutory power of decision means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting—

(a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or

(b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not.

The term “person” is similarly widely defined:

Person includes a corporation sole, and also a body of persons whether incorporated or not; and, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power of decision, includes a District Court, the Compensation Court, the Maori Land Court, and the Maori Appellate Court:

The effect of these sections is – at least, in institutional terms – to cast the net widely. From the perspective of the **identity of the actor** being challenged and the **source of their authority**, there are few decisions which are not capable of falling within the ambit of s 4. The notable exceptions are decisions made under prerogative power or decisions made by unincorporated bodies with self-adopting constitutions.¹¹⁶

(d) The procedural v jurisdictional approach

The second phrase raises an equally important consideration. It connects JAA72 to the prerogative writs and common law judicial review jurisdiction by restricting the relief available under the JAA72 to relief an applicant would have been entitled to under the prerogative writs (or applications for an injunction or declaration¹¹⁷).

In broader terms, this phrase operates as a focal point for consideration of the relationship between the statutory vehicle for judicial review and its common law equivalent. Borrowing Professor Taggart’s phraseology, there are two interpretations of the nature of the JAA72: a **procedural approach** and a **jurisdiction-conferring approach**.¹¹⁸ In simple terms, the procedural approach takes the view that the JAA72 simply provides a (“simplified and streamlined”) procedural vehicle for the existing common law remedies. Critically, the JAA72 “does not, of itself, limit or extend the court’s inherent supervisory

¹¹⁶ McGechan, JA3.05.01(2). Further, damages or compensation are not available under JAA72, but a claim for damages may be combined with common law review under Part 7 HCR. See Joseph, 1108, referring to *Anning v Minister of Education* (26 April 2002, High Court, Wellington, Goddard J, CP122/00) para 165.

¹¹⁷ See above at n 109.

¹¹⁸ Taggart, "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] NZ Recent Law 356.

jurisdiction”.¹¹⁹ The other approach takes the view that the JAA72 has some substantive effect. That is, it alters the underlying supervisory jurisdiction of the High Court on judicial review in that it extends (or narrows) the availability of judicial review.

Professor Taggart notes, correctly, that the history, letter and spirit of the JAA72, along with policy considerations, support the procedural approach.¹²⁰ The reports that led to the JAA72 and its subsequent amendment are replete with references that the JAA72 was not intended to make substantive changes to the common law jurisdiction.¹²¹ Further, although theoretically possible, the notion that Parliament can vary the courts’ inherent jurisdiction on judicial review is controversial;¹²² elsewhere the courts have been extremely vigilant to protect their underlying judicial review jurisdiction from legislative abscission.¹²³ Policy considerations also militate against the jurisdictional approach because, if it was accepted, it could lead to any decision of private bodies corporate being subject to the judicial review jurisdiction.

Case law on the point was initially more equivocal with dicta on the point going either way.¹²⁴ However, according to Taggart,¹²⁵ the point was resolved beyond doubt by the Privy Council’s judgment in *Mercury Energy*.¹²⁶ Although the point is somewhat oblique, Taggart’s basic point is that the concession made by the parties and accepted by the Privy Council that the JAA72 does not derogate from common law review under the HCR rules, combined with their Lordships assessment that the SOE was in reviewable under the JAA72 **and** common law is inconsistent with the jurisdiction-conferring approach.¹²⁷ It is also arguable that the jurisdiction-conferring approach might fall foul of enshrinement of access to judicial review in s 27(2) of the Bill of Rights Act, to the extent that it could operate to restrict access to judicial review (subject, of course, to an analysis of the reasonableness of such a limitation under s 5).

However, despite Taggart’s view, the jurisdiction-conferring approach has continued to rear its head.

In *Electoral Commission v Cameron*, speaking for a full court, Gault J made an obiter remark suggesting an analysis of the reviewability at common law of the impugned body – the Advertising Standards Authority, a private incorporated (self-)regulating body – was unnecessary because the body fell within the definitions in the JAA72.¹²⁸ Presented with an argument based on *Datafin* that the body was amenable to review at common law due to the “broad regulatory regime with coercive effect, derived from collective practice” Gault J said:¹²⁹

¹¹⁹ Taggart, "State-Owned Enterprises", *ibid*.

¹²⁰ Taggart, "State-Owned Enterprises", *ibid*.

¹²¹ Public and Administrative Reform Committee, Fourth Report, above n 113.

¹²² See, for example, Paul Craig, "Fundamental Principles of Administrative Law" in David Feldman (ed), *Public Law* (Oxford University Press, Oxford, 2004) 695.

¹²³ See particularly, the courts’ approach to privative clauses: *Bulk Gas Users Group v Attorney-General* [1989] NZLR 129, 135-136 (CA); *O’Regan v Lousich: Proprietors of Mawhera v Maori Land Court* [1995] 2 NZLR 620, 627 (CA); *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 690.

¹²⁴ Compare *Budget Rent A Car Ltd v Auckland Regional Council* [1985] 2 NZLR 414, *Webster v Auckland Harbour Board* [1983] NZLR 646, *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699, *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, and *Daemar v Gilliland* [1979] 2 NZLR 7 (HC), [1981] 1 NZLR 61 (CA).

¹²⁵ Michael Taggart, "Corporatisation, contracting and the courts" [1994] Public Law 354.

¹²⁶ *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385.

¹²⁷ Taggart, "Corporatisation", above n 125.

¹²⁸ *Electoral Commission v Cameron* [1997] 2 NZLR 421.

¹²⁹ *Ibid*. The text below it is a run-on from fn 121: See also JA Smillie, "The Judicature Amendment Act 1977" [1978]

A more direct route available in New Zealand is to be found in the Judicature Amendment Act 1972. By s 4 judicial review is available in relation to the exercise or proposed or purported exercise by any person of a statutory power. In s 3 “person” is defined to include a body of persons whether incorporated or not. “Statutory power” and “statutory power of decision” are defined in the same section so as to extend, without in any way straining the language, to the formulation by the society of regulations or bylaws (the codes) and the decisions by the board in accordance with them so as to affect the rights, powers and privileges of the commission.

Such an approach revives the jurisdiction conferring approach and cannot be correct. The remarks were obiter however because the court did not find it necessary to resolve the point due to the case morphing, due to the passage of time, from the *ex post facto* (judicial) review of the board’s actions to an *ex ante* declaration of its rules and jurisdiction under the Declaratory Judgments Act 1908.¹³⁰

More recent obiter comments of the Court of Appeal contain similar sentiments. In *Velich v Body Corporate No 164980*,¹³¹ the Court of Appeal heard an appeal from a summary judgment application regarding the rules of a body corporate under the Unit Titles Act 1972, specifically the body corporate’s refusal to consent to an owner’s request to complete the construction of a deck. William Young J accepted that, at private law, the assessment of the reasonableness or otherwise of the body corporate’s refusal was irrelevant because the rules did not explicitly prevent the unreasonable withholding of consent. However, his Honour suggested the JAA72 might provide a mechanism to subject the private body to administrative law standards:¹³²

[45] There is, however, a public law dimension to the case which seems to have been overlooked. A decision by a body corporate to grant or withhold consent under either rule 2.1(f) or default rule 1(f) would involve the exercise of a statutory power of decision for the purposes of s 3 of the Judicature Amendment Act 1972. This does not mean that the body corporate must act as if the rules provided that consent not be declined unreasonably. But we think it elementary that the body corporate, when exercising its statutory power of decision, must give proper effect to the rules and the statutory scheme as a whole. It follows that there is jurisdiction to review as irrational and indeed invalid a decision which cannot sensibly be supported in light of that regulatory and statutory scheme. ...

[48] In this context, we think it well arguable that any decision by the body corporate to refuse consent would be invalid on administrative law grounds. ...

Once again, the suggestion is that resort to the JAA72 is sufficient to establish jurisdiction to judicially review the actions of the body corporate and the consequential application of the principles of good administration to it. Taking a benevolent view of the obiter comment, Taggart suggests the Court of Appeal cannot have intended to imply that.¹³³ “It

NZLJ and David Mullan, “Judicial Review of Administrative Action” [1975] NZLJ 154.

¹³⁰ *Cameron*, *ibid*.

¹³¹ *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143.

¹³² *Ibid*, para 46-48.

¹³³ Michael Taggart, “Administrative Law” [2006] NZ Recent Law 75, 99.

is important”, he says, “to be clear as to what is the juridical basis for judicial intervention by way of judicial review. It is emphatically not the JAA...”

The summary dismissal of any need to undertake an analysis of the common law public–private distinction is also evident in the Court of Appeal’s decision in *Adlam v Stratford Racing Club*.¹³⁴ In a partly successful claim by a club member that the transfer of a racecourse to a trust was *ultra vires* the club’s rules, the Court of Appeal rejected an argument based on other obiter comments of a differently constituted Court of Appeal (noted below), that the private nature of the entity being reviewed was significant:¹³⁵

We agree that the contract route is probably preferable, where available, although the outcomes (in contract and judicial review proceedings) are usually likely to be the same. Disappointed applicants, however, are not able to bring a claim in contract, because the club has refused to make a contract of membership with them. Their only recourse is judicial review. It is arguable perhaps that Mr Adlam could have brought this claim in contract, relying presumably on implied terms as to how the power under rule 7 should be exercised. But he was not bound to follow that route. And his essential complaint against the committee, namely that they were acting unfairly and for an improper purpose, is quintessentially the stuff of judicial review.

The jurisdiction-conferring approach and absence of any substantive public–private analysis is also evident in a number of other cases involving incorporated societies. For example:

- *Church v Commerce Club*: partially successful challenge by club member that his suspension was unlawful on natural justice and bias grounds;¹³⁶
- *Surfing Taranaki Inc v Surfing New Zealand Inc*: challenge by member club to election of committee members;¹³⁷
- *Phillips v Wairarapa Kennel Association Inc*: successful challenge, based on natural justice grounds, by club member to disciplinary decision arising from actions at dog show.¹³⁸

In contrast, the Court of Appeal’s (again obiter) analysis in *Hopper v North Shore Aero Club* supports the preferred procedural approach.¹³⁹ Mr Hopper was a member of the North Shore Aero Club, an incorporated society. After he was denied permission from the club to base an “experimental aircraft ... at the Club’s airfield”, he sought judicial review on the grounds of *ultra vires*, natural justice, legitimate expectation, and unreasonableness. When faced with the lower court’s finding that judicial review jurisdiction was established by dint of the fact that the decision made under the

¹³⁴ *Adlam v Stratford Racing Club* [2008] NZAR 329.

¹³⁵ *Ibid*, para 55. For a private law scholar’s criticism of the decision – on similar grounds – from the other side of the public–private divide, see Peter Watts, “The Tort of Refusing to Contract” (2008) 14 NZBLQ 69.

¹³⁶ *Church v Commerce Club* [2006] NZAR 494. As well as ruling the court had jurisdiction to judicially review the decision, Venning J noted that it in any event it was “beyond question that as a member of a club the plaintiff had contractual rights which [permitted] him to seek declaratory relief” (para 30).

¹³⁷ *Surfing Taranaki Inc v Surfing New Zealand Inc* (27 May 2008) HC DN, CIV-2007-412-1063).

¹³⁸ *Phillips v Wairarapa Kennel Association Inc* [2005] NZAR 460.

¹³⁹ *Hopper v North Shore Aero Club* [2007] NZAR 354.

constitution of the club amounted to a “statutory power of decision” under the JAA72, the Court of Appeal was diffident. O’Regan J said:¹⁴⁰

[9] Mr Hopper’s claim was essentially that the committee’s decision in his case was not in accordance with the Club’s rules. Whether that qualifies it for review under the Act is, in our view, doubtful. Neither *Turner v Pickering* nor *Finnigan* were cases founded on the Act. *Byrne v Auckland Irish Society Inc* [1979] 1 NZLR 351, another case relied on by the appellant, was a breach of contract case, based on failure to comply with the society’s rules. This Court has indicated that a power of a private entity will not normally be amenable to judicial review under the 1972 Act unless it has a “public” aspect: *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 at 11-12 (CA)....

[11] The internal workings of incorporated societies with respect to members are primarily reviewable under the law of contract: *Peters v Collinge* [1993] 2 NZLR 554 at 566 (HC). While New Zealand Courts have been prepared to intervene in the internal affairs of an incorporated society or club in cases involving a breach of the contract constituted by the rules, this has normally been only in the limited circumstances described above at [5]. A Club’s rules will be reviewable where they, or the way in which they are applied, constitute a breach of natural justice: *Dawkins v Antrobus* (1881) 17 Ch D 615 at 630 (CA). And the basis for intervention has not been the Court’s power under the Act – rather, it has been on the basis of enforcing the contract constituted by the rules.

[12] Although it is conceivable that the actions of the Club were, on a literal reading, pursuant to a “statutory power of decision”, such a classification seems to strain the statutory definition. The Club committee was not exercising a quasi-public function, nor, for reasons we will come to, did it breach natural justice. In the absence of one or both of these features it is doubtful that a decision of a private body will be amenable to review, whether under the law of contract or under the Act. ...

The court, however, declined to definitely rule on the point because the question of amenability to review was not squarely raised in argument and, in any event, no grounds for judicial intervention were made out.¹⁴¹ Despite the brevity and provisional nature of the conclusion, for the reasons discussed above, the Court of Appeal’s approach in *Hopper* is to be preferred.

(d) Summary in relation to jurisdiction under the JAA 72 and common law

In summary, in order to establish jurisdiction to review under the JAA 72 the following must be established:

- The impugned decision must be the exercise of a “statutory power”:
 - usually a “statutory power of decision” or other interference with a person’s rights, or the exercise of legislative and investigative functions;
 - may also include a decision made under a body corporate’s constitution or rules;

¹⁴⁰ Ibid, para 11.

¹⁴¹ Ibid, para 12.

- but excludes prerogative powers or powers exercised by unincorporated bodies corporate.
- The exercise of power must be by a “person” (defined widely to also include inferior courts and incorporated and unincorporated bodies corporate).
- The decision must also be reviewable at common law through the prerogative writs (or the ordinary remedies of injunction or declaration).

In order to establish jurisdiction to review under the common law:

- The decision must fall within the “limits of public law”, as articulated by the supervisory courts in exercising their common law judicial review functions.
- In general terms, this turns on an evaluation of a range of contextual factors (discussed below), focusing on the nature of the impugned decision-maker and decision:
 - decisions of public actors are generally reviewable, as a matter of jurisdiction (but the courts may rule that particular decisions are not justiciable or not suitable for review);
 - decisions of private actors may be reviewable if those decisions can be regarded as public functions or have significant public consequences (although perhaps better expressed in terms of whether it is appropriate for public law standards to apply to these decisions).

Justiciability

As noted above, not all matters over which the courts have jurisdiction have been found by the courts to be justiciable. However, the lines between matters that will be considered by the courts and those that will not have not remained static.

Harris notes that the concept of justiciability continues to have value as an analytical tool in judicial review decision making:¹⁴²

It is a fact that the court may not be the appropriate body, or be suitably equipped in all contexts to carry out the decision making which judicial review would ideally ask of them... An advantage of justiciability as a tool of analysis is that it invites a “big picture” constitutional appreciation of whether or not the decision is an appropriate one for the courts.

The question of non-justiciability can also be characterised as being a question of the standard of review to be undertaken by the court, ie, the most extreme form of judicial deference is that a court will not consider the matter at all.¹⁴³

¹⁴² B V Harris "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 63 CLJ 631, 633.

¹⁴³ Dean R Knight, "A Murky Methodology: Standards of Review in Administrative Law" (2008) 6 NZJPIL 117; Michael Taggart, "Administrative Law" [2006] NZ Recent Law 75, 85.

Marshalling the cases: the institutional and functional matrix

Public decision-makers making public decisions

There is a presumption that decisions of public bodies are reviewable. This includes decisions of ministers, government departments, and Crown entities (including schools and district health boards) and, since *Mercury Energy v ECNZ*, has clearly also extended to the commercial organs of government.

In *Mercury Energy* Lord Templeman said that judicial review was:¹⁴⁴

...a judicial intervention to secure that decisions are made by the executive or a public body according to law even if the decision does not otherwise involve an actionable wrong.

His Lordship included state owned enterprises in this general statement, saying that:¹⁴⁵

A state-owned enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate; the Corporation carries on its business in the interests of the public. Decisions made in the public interest by the Corporation, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the Corporation are in principle amenable to judicial review both under the [Judicature Amendment Act 1972] and under the common law.

This approach is consistent with the historic institutional approach, where the identity of the actor is paramount to the jurisdiction to review – modified to take into account the changing nature of the state.

However, the courts have recognised that it may not be appropriate for all decisions of public actors to be considered by the courts. In particular, decisions with high policy content or commercial aspects may not be appropriate for consideration, or may be subject to limited grounds of review. In *Curtis v Minister of Defence*¹⁴⁶ Tipping J summarised the situation by saying that “a non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved” and noted further that “that situation will often arise in cases into which it is also constitutionally inappropriate for the courts to embark.”

Generally the courts’ approach is consistent with the separate nature of the justiciability inquiry. That is, in cases where the court has jurisdiction to review the decision, the nature of the decision may mean the court declines to do so on justiciability grounds. This is the preferred approach, particularly because it recognises that in some cases justiciability concerns may be addressed in a more nuanced way by varying the intensity of the review, rather than declining to review at all (for example, in *Mercury Energy*).

¹⁴⁴ *Mercury Energy*, above n 126, 388 (PC).

¹⁴⁵ *Ibid*, 388. Compare with the analysis of the Court of Appeal in the same proceedings: *Auckland Electric Power Board v Electricity Corporation of New Zealand* (CA).

¹⁴⁶ *Curtis v Minister of Defence* [2002] 2 NZLR 744, para 27 (CA).

Within this the category identified by Tipping J, there are four types of decision which have raised particular justiciability issues:

- prerogative powers;
- parliamentary proceedings and statutes;
- matters of high policy;
- prosecutorial powers.

(a) Prerogative powers

Traditionally, prerogative powers were considered to fall within the matters which it was considered to be constitutionally inappropriate for the courts to consider and were considered to be non-justiciable. However, in modern times, this thinking has shifted to a focus on general principles concerned with legal accountability. This shift was expounded most notably in 1985 by the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service*¹⁴⁷ where their Lordships declared that a decision might be reviewable even if it was taken under a prerogative rather than a statutory power. Their Lordships expounded the idea that reviewability depended not on the source of the power, but the substance or nature of the decision. In other words, if the subject matter in respect of which the prerogative power was exercised was one on which the court could ordinarily adjudicate, the power was subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. There was no blanket rule that prerogative powers could not be reviewed. This development is notable in its rejection of the universality of the source of power analysis that underpinned institutional perspective and marked a move to the assessment of the nature of power consistent with the functional approach.

While the finding in *CCSU* that reviewability did not depend on the source of the power was an important one, it is notable that in the case itself, the review sought was declined due to the presence of national security issues. In fact, there is a question whether the courts will consider the exercise of prerogative powers very often at all. This was recognised by Lord Roskill in *CCSU*, when he noted that while there were prerogative powers which in theory were reviewable, “as at present advised I do not think [they] could properly be made the subject of judicial review.”¹⁴⁸ Lord Roskill included in these powers:

...those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of parliament and the appointment of ministers, grant of honours, treaties, and matters of national security.

Each of these matters was regarded as a matter of high policy which it should be for ministers to decide and, by implication, for parliament to control. According to Lord Roskill, these matters:

... are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The

¹⁴⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹⁴⁸ *Ibid*, 418.

courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

It therefore remains the case after *CCSU* that while decisions taken under prerogative powers are in theory reviewable, in fact many significant decisions made under the prerogative are likely to be immune from judicial review. For example, while contrary to Lord Roskill's suggestion in *CCSU*, the New Zealand courts have indicated they may be willing to consider judicial review in relation to the Royal prerogative of mercy, this willingness may only go so far. In *Burt v Governor General*¹⁴⁹ Cooke P adopted the House of Lord's approach in *CCSU* and said that prerogative powers could no longer be considered to be outside judicial review. Rather, the test was whether the subject-matter of the decision was justiciable. However, while leaving it open that a decision relating to the Royal prerogative could be reviewable, the court did not go so far as to review the exercise of the power in the case at hand.

(b) Parliamentary proceedings and statutes

A further area where the courts have consistently found decisions to be non-justiciable are matters preliminary to the making of legislation. This reflects the doctrine of the separation of powers and is "a corollary of the courts' disclaimer of jurisdiction to review legislation. The courts will not allow their processes to be used so as to inhibit the free functioning of Parliament."¹⁵⁰

This philosophy has been demonstrated clearly in recent years in a series of cases involving Treaty of Waitangi settlements, where the courts have consistently held that matters preliminary to settlement legislation are outside their jurisdiction. These decisions are of high policy content and are considered to be matters which are appropriately dealt with in a political, rather than a judicial, forum.

For example, in *Milroy v Attorney General*¹⁵¹ the Court of Appeal confirmed that the formulation of government policy preparatory to the introduction of legislation is not to be fettered by judicial review and rejected an argument that there might be cases in the Treaty process where the courts should intervene. Gault P said:¹⁵²

Such an approach ...would blur the boundaries between the role of the Executive government and that of the courts. It would invite curial review of research, advice and opinion for which no objective justiciable guidelines are available.

Rather the court held that where the process for addressing claims in respect of breaches of the treaty involves the exercise by the executive of statutory or prerogative powers lawfulness can be challenged on established grounds for judicial review, but where the action challenged does not itself affect the rights of any persons and is undertaken in the

¹⁴⁹ *Burt v Governor-General* [1992] 3 NZLR 672 (CA).

¹⁵⁰ Philip Joseph, above n 31, *Constitutional and Administrative Law* (3rd ed, Brookers, Wellington, 2007) para 14.4.2.

¹⁵¹ *Milroy v Attorney-General* [2005] NZAR 562.

¹⁵² *Ibid*, para 14–18.

course of policy formulation preparatory to the introduction of Parliament of legislation, the courts will not intervene.¹⁵³

See also the recent decision of the High Court that the Attorney-General's reporting role under s 7 of the Bill of Rights is not justiciable.¹⁵⁴

(c) Matters of high policy

The reluctance of the courts to intervene in many of the matters dealt with by prerogative powers is also consistent with their reluctance to deal with matters of high policy generally, even when these may relate to the exercise of statutory powers.

This concern was highlighted in the New Zealand Court of Appeal's decision in *Curtis v Minister of Defence* which considered the decision of the Minister of Defence to disband the air combat force of the New Zealand Air Force. The Court of Appeal cited with approval Wilson J's words in *Operation Dismantle v the Queen*¹⁵⁵ where her Honour noted that matters of defence are not justiciable because they "involve moral and political considerations which it is not within the province of the courts to assess". Tipping J said the issue of whether the minister's decision left the RNZAF insufficiently armed was not a question which was susceptible for determination by any legal yardstick. Rather, it was one of government policy into which it "is constitutionally improper for the courts to go".¹⁵⁶

Matters of high policy will at the least usually attract heightened judicial deference as was noted in *Wellington City Council v Woolworths New Zealand Limited (No 2)*¹⁵⁷ where the Court of Appeal said that:

[t]here are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene.

In that case, the court found that rating requires the exercise of political judgment by the elected representatives of the community and that this was not one of those extreme cases meeting the stringent test for impugning the rating determinations.¹⁵⁸

The courts are also less likely to review a decision by a specialist body such as Pharmac, although this deference applies only to the extent the expertise is necessary to determine the decision (eg if the decision was made according to the required procedural requirements).

¹⁵³ Ibid, para 18.

¹⁵⁴ *Boscawen v Attorney General* (20.06.08 High Court, Wellington).

¹⁵⁵ *Operation Dismantle v the Queen* [1985] 1 SCR 441, 465 (Supreme Court of Canada) cited in *Curtis*, para 26.

¹⁵⁶ *Curtis* above n 146, para 27.

¹⁵⁷ *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537, 546.

¹⁵⁸ Ibid, 553.

(d) Prosecutorial powers

Finally, another area where the courts have been reluctant to intervene is in relation to decisions relating to prosecutions. In *Hallett v Attorney-General*,¹⁵⁹ Gallen J found that a decision whether or not to prosecute was an exercise of a statutory power and the court was able to consider whether the defendant had fulfilled its statutory obligation in this regard. However, the courts would not generally review the exercise of the discretionary power concerned, because:

If the Courts were to indicate that prosecution action should have been initiated, this is very close to indicating an attitude towards the outcome of the particular situation and since the Courts are charged with the determination of prosecutions, the outcome could well be prejudiced by the decision requiring prosecution action to follow.

More recently in *Polynesian Spa Ltd v Osborne*¹⁶⁰ Randerson J emphasised again that judicial review of decisions around prosecutions would be rare. He noted that traditionally, the courts have shown a marked reluctance to interfere with the exercise of a discretion to prosecute and in some cases, it is said that such powers are not reviewable at all. Randerson J listed the following “sound reasons” for the courts’ reluctance to interfere:¹⁶¹

- (a) It is important that the proper constitutional boundaries be observed. The discretion to prosecute on behalf of the state is a function of executive government rather than the courts whose function is to ensure the proper and fair conduct of trial: *Fox v Attorney-General* [2002] 3 NZLR 62 at [31]. See also *Police v Hall* [1976] 2 NZLR 678, 673 (CA) and *R v Sang* [1980] AC 402, 454 (HL).
- (b) Criminal proceedings should not generally be subject to collateral challenge. Entertaining challenges of this kind outside the trial and appeal process is likely seriously to disrupt the criminal justice system: *R v Director of Public Prosecutions, ex parte Kebilene and Ors* [1999] 4 All ER 801, 834 per Lord Steyn.
- (c) As noted in *Fox* in the same passage, decisions to initiate and continue prosecutions generally involve a high content of judgment and discretion in the decisions reached.
- (d) Where a prosecution ensues, the courts possess an inherent power to stay or dismiss a prosecution for abuse of process. Fox reviewed the principles upon which a court may act to protect against such an abuse.
- (e) The conclusion on behalf of a prosecuting authority that an offence has been committed is merely an expression of opinion which is capable of being challenged in court: *R v Sloan* [1990] 1 NZLR 474, 478.

¹⁵⁹ *Hallett v Attorney-General* [1989] 2 NZLR 87, 94 (HC) Gallen J.

¹⁶⁰ *Polynesian Spa Ltd v Osborne* [2005] NZAR 408.

¹⁶¹ *Ibid*, paras 61-62.

- (f) If factual errors are made in an investigation by a prosecuting authority or if there is further or other material which a defendant considers ought to have been weighed by the prosecuting authority, there is an opportunity to explore and test such issues at trial and to bring such further evidence as the defendant sees fit.

His Honour said:¹⁶²

In summary, where a decision to prosecute has been taken, there is jurisdiction to entertain a challenge on judicial review. But it will only be in rare cases that any such challenge will be successful for the substantial policy and constitutional reasons reviewed in [the passage] above. Ordinarily, matters which may have afforded grounds for judicial review in other contexts are properly addressed by the court exercising jurisdiction at trial. Those powers include jurisdiction to stay or dismiss for abuse of process or to allow time for any defects in disclosure to be remedied. Importantly, issues of law, fact or opinion may be fully ventilated at trial with full opportunity to test the prosecution case and to adduce such evidence as the defendant sees fit.

Where a decision not to prosecute is taken, the safeguards and alternative remedies just discussed are not available. Nevertheless, the same constitutional and policy concerns arise and the courts show considerable restraint in interfering with the exercise of prosecutorial discretion. Hallett is authority for the proposition that judicial review is only likely to be obtained in such a case where there has been a failure to exercise discretion, such as by the adoption of a general policy that in certain classes of cases, prosecutions will not be brought. There may be other grounds but it is likely only to be in exceptional cases that a court would intervene where a decision has been taken not to prosecute in a specific case not affected by factors such as the adoption of a general policy.

Public decision-makers making private decisions

While the areas of non-justiciability above are relatively settled, there is still some murkiness about the circumstances in which the courts will review decisions of public actors about commercial matters such as purchase contracts.

In this regard, it has been clear since *Webster v Auckland Harbour Board*¹⁶³ that the exercise of contractual powers by public authorities is open to review in appropriate cases, particularly where they may be characterised as being associated with the exercise of a statutory power. However what those cases are remains a difficult question.

It now appears accepted that whether a commercial decision by a public actor is reviewable or reviewable only on limited grounds, depends on the place of the decision on a continuum which rates the “public element” of the decision and whether it goes beyond commercial into the realm of a “quasi governmental decision”. The point at which a private commercial operation merges into a public one attracting judicial review and

¹⁶² Ibid, paras 68-69. For other controls within the criminal law system, see *Fox v Attorney-General* [2002] 3 NZLR 62.

¹⁶³ *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA).

public law duties is thus a question of degree.¹⁶⁴ The presumption of reviewability is strengthened where individuals are left without any form of redress.¹⁶⁵

Further, it is difficult to discern whether the courts refusal to intervene in any particular case arises from jurisdictional concerns or non-justiciability. While the combined outcome of the jurisdictional and justiciability questions may be the same, the answers to the two separate questions might be different, either:

- the courts assert jurisdiction to review the decision of a public body (based on an institutional perspective) but decline to review commercial decisions because of their non-justiciable nature;
- the courts decline jurisdiction to review the commercial decisions of a public body because, from a functional perspective, commercial decisions are private in nature and beyond the reach of public law.

As noted above, the former approach seems to be most compatible with the courts' approach – although there remains some analytic uncertainty about this.

(a) Purely commercial decisions

Under the continuum of reviewability approach, at one end of the continuum are purely commercial decisions under, for example, a supply contract. In *Mercury Energy* the Privy Council declined to review a decision of Electricity Corporation of New Zealand (“ECNZ”) to determine its contract with Mercury Energy to supply bulk electricity at agreed prices. The court held that it was unlikely that a decision by a state owned enterprise to:

...enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.¹⁶⁶

That is, such decisions are not completely non-justiciable, but the grounds of review will be limited or the degree of deference will be high.

In *Vector v Transpower NZ Ltd*¹⁶⁷ review was similarly not allowed of Transpower's pricing regime. In that case, the court did not limit review necessarily to fraud, corruption or bad faith, but said that complicated price-fixing regimes were more appropriately addressed through a forum other than judicial review.

While clearly based on principle, one might query, though, the place of *New Zealand Private Hospitals Association - Auckland Branch v Northern Regional Health Authority*¹⁶⁸ at this end of the continuum particularly in the light of later case law. In that case, Blanchard J considered whether to grant interim relief restraining the Northern Regional Health Authority (“RHA”) from continuing with a tender process for hospital continuing care services and took the view that purchase of such services by an RHA

¹⁶⁴ *Te He Putea Atawhai Trust v Health Funding Authority* (HC Ak, CP 497/97, 8 October 1998, Fisher J).

¹⁶⁵ *Mercury Energy* (PC), above n 126, 388.

¹⁶⁶ *Mercury Energy*, above n 126, 391.

¹⁶⁷ *Vector v Transpower NZ Ltd* (HC, Ak, CL 1/98/ 17 August 2000, Williams J and Dr M Brunt).

¹⁶⁸ *New Zealand Private Hospitals Association – Auckland Branch (Inc) v Northern Regional Health Authority* (HC Ak, CP 440/94, 7 December 1994, Blanchard J).

under the Health and Disability Services Act was a “trading function” and not reviewable. In his view:¹⁶⁹

It would be quite intolerable if, in addition to rules of contract law and other principles of the general law (including equity), a statutory body of this type... should also be subject to judicial review, including particularly an obligation to observe the principles of natural justice. Any trading organisation subjected to that requirement would be at a distinct disadvantage. I doubt very much that those who framed the health reforms would have intended that to be so.

Thus Blanchard J obviously thought the commercial funding model of the RHAs overrode the public nature of the decisions being made about health services.

By contrast, the decision of the Hawke’s Bay Crown health enterprise in relation to establishment of a regional acute hospital at Hastings and to substantially reduce the services previously provided at the Napier Hospital was found by Ellis J to be at the other end of the continuum, and to be justiciable. This was a decision of a strong public nature where clearly private law remedies, if they existed at all, were not considered sufficient. In *Napier City v Healthcare Hawke's Bay Ltd*,¹⁷⁰ Ellis J, noted that:

It has always been understood that many commercial transactions cannot be reviewed, but the difficulty has arisen in some cases where the importance or significance of the decision takes it out of the realm of purely commercial and into the realm of quasi governmental administrative decisions which is reviewable.

There the decision was found to be so significant that it was more than a commercial decision and the decision on the hospital was held to be justiciable.

(b) Decisions of mixed public/private nature

Private law trumps

Many decisions of public actors will of course fall somewhere in the middle of the continuum of commercial decisions that are justiciable. This was recognised by Eichelbaum CJ in *Southern Community Laboratories Ltd v Healthcare Otago Ltd*,¹⁷¹ a decision about the provision of diagnostic tests and pathology services. In that case Eichelbaum CJ found that:

The provision of diagnostic tests and other pathology services no doubt occupies some intermediate position [on the continuum]; the proper availability of such services certainly has a public interest component. Indeed, virtually every administrative decision made by or on behalf of a CHE must have at least the potential to impact directly or indirectly, on the quality of health care services. That alone cannot be sufficient to attract the availability of public law remedies. ... However I think it is sufficiently

¹⁶⁹ Ibid, 42.

¹⁷⁰ *Napier City v Healthcare Hawke's Bay Ltd* (HC Napier, CP 29/94, 15 December 1994, Ellis J).

¹⁷¹ *Southern Community Laboratories Ltd v Healthcare Otago Ltd* (HC Dunedin, CP 30/96, 19 December 1996, Eichelbaum CJ).

clear that the decision made by the CHE here cannot be placed in the same category, as the major problem faced by the corresponding body in the Napier City Council case. It cannot be said, as the Judge was able to say there, that the importance or significance of the decision took it out of the realm of the purely commercial, and into that of a reviewable quasi governmental administrative decision. As in the New Zealand Private Hospitals case, it relates to the CHE's trading function. ... Certainly the decision at issue has the potential to impact on the delivery of a particular branch of healthcare services, but if the result is criticisable the CHE is responsible to the Minister in charge and to Parliament. The decision is and remains, essentially, a commercial one.

In the event, Eichelbaum J struck out the claim saying that:

[T]he more I have studied the statement of claim the clearer it has become that it is an attempt to incorporate administrative law concepts into a commercial decision-making process.

In his view, the type of decision was not one that should be reviewable by the courts. In this, he agreed with the approach of Blanchard J in the *Private Hospitals* case.

The outcome in *Southern Community Laboratories* was mirrored in *Schelde Marinebouw BV v Attorney General*,¹⁷² where a challenge to a process tender relating to the purchase of defence equipment was held to be a commercial decision that was not challengeable in a proceeding for judicial review. Gendall J noted that where a process tender such as this exists the usual avenue for remedy by a person who is aggrieved is in contract, not judicial review. However, contractual remedies are not often designed to deal with concepts of unfairness, unreasonableness or natural justice, which is why plaintiffs may choose to follow the judicial review route, rather than seek a contractual remedy. Gendall J continued to say that embarking on judicial review proceedings does not necessarily mean that a remedy in public law is available. "It will surely depend upon the nature of the right and the manner by which it is breached through the decision-making process."¹⁷³

In the case, Gendall J said, similarly to Eichelbaum CJ in the *Southern Community Laboratories* case, that while the power being exercised was public in one sense as it involved the expenditure of public monies:

...it is still circumscribed by the process tender and that of contract, with the process having only private consequences as between Ministry and the tenderer, the processes "private" between the contracting parties.

He noted further that without the tender process the policy decision about the allocation of the contract for the defence equipment would not have been justiciable, so it was hard to see how the plaintiff could claim to have some rights in judicial review other than those arising out of the contract (except in the exception circumstances referred to in *Mercury Energy* of fraud, corruption or bad faith.). His Honour concluded that the case was similar to that in *Southern Community Laboratories*, and found the Ministry's decision relating to the tender was non-justiciable.

¹⁷² *Schelde Marinebouw BV v Attorney General* [2005] NZAR 356.

¹⁷³ *Ibid*, para 24.

Notably, the Attorney-General also argued that the process was not reviewable because the subject matter of the tender was defence equipment, and that was a matter of government policy (based on *Curtis*). The court did not accept this view saying that “the process in this case does not come within the ‘defence of the realm’ exception”¹⁷⁴ - to have a certain naval fleet might be a policy question, but with whom and how the Ministry might contract for the provision of such vessels was a different question.

Medlab

What then was different in the case of *Diagnostic Medlab Ltd v Auckland District Health Board*,¹⁷⁵ which caused Asher J to find that a decision of the Auckland District Health Boards to enter into a contract for community pathology testing services with Lab Tests Auckland Ltd was, by contrast with *Southern Community Laboratories* and *Schelde*, reviewable? The answer is that it is not clear. Unfortunately, this preliminary question was not fully argued and the defendants, the District Health Boards (“DHBs”) and Lab Tests, merely accepted that the decision to grant the contract to Lab Tests was amenable to judicial review.

Nevertheless, Asher J did set out some of his reasoning for the view that the decision was inherently justiciable. Namely, at issue in the case was the exercise of the power under s 25 of the New Zealand Public Health and Disability Act (“NZPHD”) 2000, which provides that a DHB may “if permitted to do so by its annual plan, and in accordance with that plan – negotiate and enter into services agreements....”. Asher J found that exercise of this power was different to the equivalent power of a Crown health enterprise considered in *Southern Community Laboratories* on the basis that that case dealt with the superseded Health and Disability Services Act 1993, which provided that the Crown health enterprises (the predecessor to the DHBs) should be as successful and efficient as comparable businesses that are not owned by the Crown. He noted that there is no reference in the NZPHD Act to DHBs being comparable to business and that the primary focus for DHBs is the improvement of the health of the New Zealand public.

Asher J said simply that:¹⁷⁶

The commercial context present in *Southern Community Laboratories* has gone, and the DHBs’ power to enter into contracts with service providers should be subject to judicial review. DHBs are clearly public bodies. DHBs’ ability to enter into contracts with major service providers goes to the heart of their statutory duty to protect and improve public health. The Lab Tests contract ...has significant public consequences. I therefore conclude that the decision to enter into the contract with Lab Tests is reviewable.

However, query whether in fact all these factors identified by Asher J were also true of the CHE in the *Southern Laboratories* case, if not also the RHA in the *Private Hospitals* case? Asher J appears to have concluded that reviewability depends not only on the public nature of the decision, but also the nature of the actor (ie how commercial the model under which the decision is made is). This emphasis seems to be contrary to the

¹⁷⁴ Ibid, para 20.

¹⁷⁵ *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

¹⁷⁶ *Diagnostic Medlab*, above n 172, para 14.

cases where, for example, Ministries' commercial decisions have been found to be non-justiciable.¹⁷⁷

Moreover, Francis Cooke has noted that, as in *Schelde* there was no requirement in the New Zealand Public Health and Disability Act 2000 for the DHBs to follow a Request for Proposal process. This was merely a matter of government policy.¹⁷⁸ Like the *Schelde* case, therefore a different process might have limited the ability to seek judicial review. Query also then whether like *Schelde* there may have been sufficient private law remedies available through arguments about the process contract, without the need to extend the jurisdiction of judicial review in such a case to include concepts of natural justice. This aspect was not considered by Asher J. However his extension of judicial review to a decision such as that in *Medlab* makes inroads into what Blanchard J said in the *Private Hospitals* case would be unworkable for an entity with a trading function and must lead to murkiness as to where on the continuum of justiciability, the decisions of DHBs should sit.

Post Diagnostic Medlab

Having said that, that *Medlab* must be considered on its own facts, rather than representing a quantum shift is illustrated by the more recent decision in *Bayline Group Ltd v Secretary for Education*,¹⁷⁹ where the unsuccessful tenderer for provision of school bus services took an action for judicial review of the Secretary of Education's decision on the tender. Simon France J cited with approval a recent article by Professor Stephen Bailey summarising the position with judicial review of commercial decisions where Professor Bailey said:¹⁸⁰

The extent to which judicial review is available as a remedy in respect of the contracting decisions of public authorities has caused difficulty for as long as judicial review has existed in its modern form... The case law tends to support the proposition that for contracting decisions taken in the exercise of statutory power to be subject to judicial review, there must be some specific public law element beyond the mere fact that the body is exercising a statutory power to contract.

In the case Simon France J found that the decision on the tender contained no public consequences at all. The two bidders were tendering to provide the exact same services at the exact same times. Both proffered comparable levels in terms of buses and quality of service. There was no wider policy content and the decision was quintessentially a low level contracting decision. His Honour found that that subject matter was a great distance from the issues in the *Diagnostic Medlabs* case where Asher J noted that the particular contract went to the heart of the District Health Board's statutory duty to protect and improve health. Simon France J noted that "If there be a spectrum, in my view that case and the present lie at the opposite ends."¹⁸¹ In the *Bayline* case, he found the decision was not justiciable.

¹⁷⁷ For example, *Schelde* (above, n 172), and *Bayline* (below, n 179, 98).

¹⁷⁸ Francis Cooke *Diagnostic Medlab: was the diagnosis correct?* (NZLJ, May 2008) 166).

¹⁷⁹ *Bayline Group Limited v Secretary for Education* [2007] NZAR 747.

¹⁸⁰ Stephen Bailey, "judicial Review of Contracting Decisions" [2007] Public Law 444, quoted in *ibid*, para 27.

¹⁸¹ *Ibid*, paras 30 and 31.

By contrast, in *Air New Zealand Ltd v Nelson Airport Ltd*,¹⁸² Wild J found that the setting of landing charges at Nelson Airport was not a non-justiciable commercial decision, largely because it was made under a statutory provision, but also because it had the “public nature” appropriate to review. In this Wild J accepted the following reasoning:

- the airport company, although a private company was owned 50/50 by two local authorities;
- Nelson Airport is a vital part of the transport infrastructure for Nelson;
- User charges imposed on airlines by statute have a direct relationship to the fares charged to the public;
- The subject matter is conceptually similar to cases dealing with telecommunications, powers, health, transport, cases which the Court has accept as involving public law issues.

It was also significant to Wild J’s decision about justiciability that Air New Zealand had no private law remedy.

Summary in relation to private decisions of public decision-makers

In summary, whether commercial decisions of public authorities are reviewable depends on where they may be placed by the relevant court on the continuum of decisions in which the courts should intervene. In a situation where there is fraud, bad faith or corruption, any commercial decision is likely to be reviewed by the courts, but absent this, justiciability is largely a judgment for the individual judge of how significant the decision is in the public context. It also appears following the reasoning in both *Medlab* and the *Nelson Airport* case that while the substance and nature of the decision are key (the functional approach), the identity of the impugned body (the institutional approach) may still be important.

As Cane said:¹⁸³

Ultimately, then, whether a function is public or not depends, in part at least, on a value judgment about whether its performance ought to be subject to control in accordance with public law principles. The answer to this question, in turn, depends in part on the reasons for drawing the distinction between public and private law. These reasons may vary according to context. Because there are various reasons for distinguishing between public law and private law, there are various criteria for determining whether any particular function is public or not. All of these criteria are complex, and their application to particular cases in the context of litigation may require a court to make difficult and sometimes controversial judgments. The important point to make is that such judgments are not about whether particular functions are public or private but about whether accountability for the performance of particular functions should follow public law or private law rules and principles. Classification of functions as public or private follows this prior judgment about the appropriate accountability regime.

¹⁸² *Air New Zealand Ltd v Nelson Airport Ltd* (16 June 2008, H Ct, Nelson, Wild J CIV-2007-442-584.

¹⁸³ Cane, above n 86, 17-18.

Private bodies making public decisions

The potential reviewability of private bodies when making public decisions has now become orthodox. It embraces the functional (or contextually functionally) perspective and seeks to assess whether, as a matter of substance, the decision is one which can be regarded as being “public”.

The leading case in this category is the well-known *R v Panel of Take-overs and Mergers, ex parte Datafin Plc* case.¹⁸⁴ The Court of Appeal held that the private unincorporated association, acting as a self-regulator of take-overs and mergers, was subject to common law judicial review. The statement of the essential requirement of “publicness” was framed in numerous different ways in the judgments – “public law functions”,¹⁸⁵ “public element”,¹⁸⁶ “public duty”,¹⁸⁷ “public law consequences”¹⁸⁸ – although a strong contradistinction is drawn with bodies whose “sole source of power is a consensual submission to its jurisdiction”.¹⁸⁹ Sir John Donaldson MR’s conclusion that the panel was undertaking a public function was based on a number of contextual factors:

- the recognition of the panel in the surrounding statutory scheme;¹⁹⁰
- the analogy with governmental performance of the panel’s functions in other jurisdictions or similar functions in the same jurisdiction;¹⁹¹
- the likelihood of governmental regulation if the panel did not perform its function;¹⁹²
- the magnitude of the power exercised;¹⁹³
- (un-)availability of other remedies;¹⁹⁴

Notably, consistent with the historic institutional perspective, Lloyd J was also prepared to hold that the source of power was in fact governmental, at least in part:¹⁹⁵

[T]he source of power is governmental, at least in part. ... [T]here has been an implied devolution of power. ... Having regard to the way in which the panel was established, the fact that the Governor of the Bank of England appoints both the chairman and the deputy chairman, and the other matters to which Sir John Donaldson MR has referred, I am persuaded that the panel was established ‘under authority of the Government,’ ...

But the jurisdictional point which *Datafin* is famous for was only one part of the equation. The Court of Appeal’s comments on the applicable doctrinal or substantive principles should not be overlooked. In approaching the reviewability of the quasi-public exercise

¹⁸⁴ *R v Panel of Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815; [1987] 1 All ER 564 (CA).

¹⁸⁵ *Ibid*, 836 Sir John Donaldson MR; 847 Lloyd LJ.

¹⁸⁶ *Ibid*, 838 Sir John Donaldson MR.

¹⁸⁷ *Ibid*, 836 Sir John Donaldson MR; 847 Lloyd LJ; 850 Nicholls LJ.

¹⁸⁸ *Ibid*, 847 Lloyd LJ; 852 Nicholls LJ.

¹⁸⁹ *Ibid*, 838 Sir John Donaldson MR.

¹⁹⁰ *Ibid*, 835.

¹⁹¹ *Ibid*, 835-838.

¹⁹² *Ibid*, 835.

¹⁹³ *Ibid*, 835-836.

¹⁹⁴ *Ibid*, 839.

¹⁹⁵ *Ibid*, 849 adopting the submissions of counsel for the applicant.

of power, the court intimated a more deferential approach was mandated in relation to each of its functions:¹⁹⁶

Consistently with its character as the controlling body for the self-regulation of take-overs and mergers, the panel combines the functions of legislator, court interpreting the panel's legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches of the code. As a legislator it sets out to lay down general principles, on the lines of EEC legislation, rather than specific prohibitions which those who are concerned in take-over bids and mergers can study with a view to detecting and exploiting loopholes.

Against that background, there is little scope for complaint that the panel has promulgated rules which are ultra vires, provided only that they do not clearly violate the principle proclaimed by the panel of being based upon the concept of doing equity between one shareholder and another. ...

When it comes to interpreting its own rules, it must clearly be given considerable latitude both because, as legislator, it could properly alter them at any time and because of the form which the rules take, i.e. laying down principles to be applied in spirit as much as in letter in specific situations. Where there might be a legitimate cause for complaint and for the intervention of the court would be if the interpretation were so far removed from the natural and ordinary meaning of the words of the rules that an ordinary user of the market could reasonably be misled. Even then it by no means follows that the court would think it appropriate to quash an interpretative decision of the panel. It might well take the view that a more appropriate course would be to declare the true meaning of the rule, leaving it to the panel to promulgate a new rule accurately expressing its intentions.

Again the panel has powers to grant dispensation from the operation of the rules: see, for example, rule 9.1 of the code. This is a discretionary power only fettered by the overriding obligation to seek, if not necessarily to achieve, equity between one shareholder and another. Again I should be surprised if the exercise of this power could be attacked, save in wholly exceptional circumstances and, even then, the court might well take the view that the proper form of relief was declaratory rather than substantive.

This leaves only the panel's disciplinary function. If it finds a breach of the rules proved, there is an internal right of appeal which, in accordance with established principles, must be exercised before, in any ordinary circumstances, the court would consider intervening. In a case, such as the present, where the complaint is that the panel should have found a breach of the rules, but did not do so, I would expect the court to be even more reluctant to move in the absence of any credible allegation of lack of bona fides. It is not for a court exercising a judicial review jurisdiction to substitute itself for the fact-finding tribunal and error of law in the form of finding of fact for which there was no evidence or in the form of a mis-construction of the panel's own rules would normally be a matter to be dealt with by a declaratory judgment. The only circumstances in which I would anticipate the use of the remedies of certiorari and mandamus would

¹⁹⁶ Ibid, 841 Sir John Donaldson MR. See also the subsequent statement in the *Guinness* case, below n 199.

be in the event, which I hope is unthinkable, of the panel acting in breach of the rules of natural justice - in other words, unfairly.

Although jurisdiction is established, the standard of review that applies recognises the private (and self-created) nature of the institution, with the grounds for intervention being significantly circumscribed.

The leading equivalent cases in New Zealand are *Cameron* and *Royal Australasian College of Surgeons v Phipps*.¹⁹⁷

In *Cameron*, the applicant for review – rather unusually, the Solicitor-General – based his submission that the impugned body, the Advertising Standards Complaints Board, was subject to judicial review on the *Datafin* principle. Regrettably, the Court of Appeal did not comment on or directly apply the *Datafin* principle, favouring the (erroneous) direct route approach.¹⁹⁸ However, it seems clear that the body in question would have been reviewable under the contextual *Datafin* principle in any event, particularly due to the following factors:

- near monopolistic power (“collective standard-setting upon the commission and other advertisers, essentially across all major media groups”);¹⁹⁹
- recognition in the surrounding statutory scheme;²⁰⁰
- nature of the function (“broad regulatory regime with coercive effect, derived from collective practice”);²⁰¹
- similar functions being undertaken by governmental bodies (“decisions of the Broadcasting Standards Authority, exercising cognate jurisdiction under the Broadcasting Act, plainly are reviewable”).²⁰²

Again, a more nuanced approach to the applicable doctrinal or substantive principles is also evident:²⁰³

Finding that decisions of the board are amenable to review still leaves for consideration the grounds upon which review may be granted. Decisions of unincorporated bodies exercising public regulatory functions may not easily fall for examination on conventional grounds of illegality, irrationality and procedural impropriety. In appropriate cases a more flexible approach may be called for. This was favoured by Lord Donaldson MR in *R v Panel on Take-overs and Mergers, ex parte Guinness plc*:

“It may be that the true view is that in the context of a body whose constitution, functions and powers are sui generis, the court should review the panel’s acts and omissions more in the round than might otherwise be the case and, whilst basing its decision on familiar concepts, should eschew any formal categorisation In relation to such an innominate ground the ultimate question would, as always, be whether something had gone wrong

¹⁹⁷ *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, issue not discussed by Privy Council on appeal (*Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513, para 2).

¹⁹⁸ See text at n 128.

¹⁹⁹ *Cameron*, above n 128, 429.

²⁰⁰ *Ibid*, 425, 432.

²⁰¹ *Ibid*, 429.

²⁰² *Ibid*, 429.

²⁰³ *Ibid*, 430.

of a nature and degree which required the intervention of the court and, if so, what form that intervention should take.”

What was unusual in the context of the *Cameron* case was the court’s readiness to apply greater than usual intensity when reviewing the actions of the board. However, that approach may be justified for the unique and unusual circumstances of the cases, particularly the potentially overlapping jurisdictions of the board and its governmental sibling, the Broadcasting Standard Authority.

The *Datafin* principle was endorsed though by the Court of Appeal in the *Phipps* case. In *Phipps*, a surgeon challenged an adverse report on his work prepared by the Royal Australasian College of Surgeons (a professional organisation of which the surgeon was not a member) at the request of his employer, HealthCare Otago. In accepting the report was reviewable under the JAA72, the court emphasised the shift to the functional approach at common law:²⁰⁴

What is in issue is whether the power or right it was exercising in carrying out the review was done by or under the constitution of a body corporate. As indicated, the issue was put in argument as a contest between the public and private character of the college review process or between the constitutional and contractual basis of that review. If the public and constitutional characterisation prevailed, then the report was reviewable. If on the other hand the private and contractual characterisation was uppermost then it was not reviewable. Or so the argument ran. ...

One broad purpose of the 1972 Act, especially when taken with the 1977 amendments, was to remove technical problems which had until that time bedevilled applications for judicial review by way of the prerogative writs and declarations. Rather, the attention of the parties and of the Court should be focused on the issues of substance, especially the issues of what actual exercises of power are reviewable and on what grounds. In that inquiry the origins of the power and the various characteristics of the decider would often be very important, indeed frequently decisive. But that would not necessarily be so. **Over recent decades Courts have increasingly been willing to review exercises of power which in substance are public or have important public consequences, however their origins and the persons or bodies exercising them might be characterised, eg *R v Panel on Take-overs and Mergers, ex parte Guinness plc*, considered in the *Electoral Commission* case.** Indeed, that judicially-made law goes back much longer when cases concerned with clubs (such as those referred to in *Ridge v Baldwin*) are taken into account. The lawmakers have supported that development over recent decades as is seen in the 1972 Act, the 1977 amendment (which extends beyond powers conferred by statute to powers conferred by or under documents of incorporation) and most recently in the more broadly-drafted provisions of R 626 of the High Court Rules relating to certiorari. ... The Courts have made it clear that in appropriate situations, even although there may be no statutory power of decision or the power may in significant measure be contractual, they are willing to review the exercise of the power including review for breaches of natural justice, the ground argued in the present case. See eg *Re Erebus Royal Commission*

²⁰⁴ *Phipps*, above n 197, 10-11(citations omitted; emphasis added).

(No 2), *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, and *Webster v Auckland Harbour Board*. While the historical development suggests a liberal approach to the availability of review proceedings, the powers of the Court are not, of course, at large. They must be rooted in principle and in the texts of the relevant statutes and rules. ...

Significant is the central emphasis on “publicness”, rather than a technical analysis of the statutory rules under the JAA72. Although not clearly articulated, the implicit finding of the court was that the disciplinary investigation had some public character, particularly in the light of the analogy with the circumstances in which administrative law courts require compliance with the principles of natural justice.²⁰⁵

[T]he proceedings challenge the college's examination of the past conduct of a member of the medical profession in particular instances of the practice of that profession, an examination which is exactly the type of situation in which high standards of procedural fairness are expected, to support the process of making the careful professional judgments that are called for. [T]he Courts have traditionally been alert to see that in contexts such as the present those high standards of procedural fairness are met. ...

The reference to significant public consequences is perhaps a nod to *Finnigan v New Zealand Rugby Football Union*.²⁰⁶ In *Finnigan* Lord Cooke relied on the “position of major national importance” and the significant effect of the decision of the New Zealand Rugby Union (a private incorporated society) when he accepted that two members of associated societies had standing to challenge the decision to send a team to South Africa.²⁰⁷

In the present case the following factors carry weight.

...

3. In its bearing on the image, standing and future of rugby as a national sport, the decision challenged is probably at least as important as - if not more important than - any other in the history of the game in New Zealand.

4. The decision affects the New Zealand community as a whole and so relations between the community and those, like the plaintiffs, specifically and legally associated with the sport. Indeed judicial notice can be taken of the obvious fact that in the view of a significant number of people, but no doubt contrary to the view of another significant number, the decision affects the international relations or standing of New Zealand.

5. While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed

²⁰⁵ Ibid, 12. The reasoning could also be read as a failure to apply the publicness requirement articulated, in favour of the perennial jurisdiction-conferring approach!

²⁰⁶ *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159.

²⁰⁷ *Finnigan*, above n 206 178-179.

too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power - although that was argued. We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.

Although strictly speaking the case was a private law proceeding,²⁰⁸ the case has subsequently been used to augment the proposition that decisions of private entities are subject to supervision by judicial review in cases where there are significant public consequences.²⁰⁹

Since *Phipps*, the “public function” or “important public consequences” approach has been adopted in a number of cases, for example:

- *Dunne v Canwest TVWorks Ltd*: successful application to review of decision of broadcaster to exclude two party leaders from televised election debate;²¹⁰
- *Wilson v White*: challenge to appointment of surgeon by District Health Board;²¹¹
- *Challis v Destination Marlborough Trust Board Inc*: challenge to actions of trust board established by local authority;²¹²
- *Singh v Auckland District Law Society*: challenge to complaints investigation instigated by district law society.²¹³

As noted by Professor Taggart, the “case law has been far from consistent” when applying the public function and public consequences test.²¹⁴ As with any contextual assessment, “factor balancing” brings some uncertainty of outcome.²¹⁵ However, in summary, the types of factors the courts have had regard to when considering the publicness of decisions of private bodies include the following:

- the source of power and funding (a public source is usually determinative; the absence not);
- the magnitude of the power exercised;
- the (inherent?) nature of the function itself (particularly where disciplinary or coercive);
- any recognition of the body or function in the surrounding statutory scheme;

²⁰⁸ See particularly Michael Taggart, “Rugby, the anti-apartheid movement, and administrative law” in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis, Wellington, 2006) 69, 83-91.

²⁰⁹ See, for example, *Peters v Collinge* [1993] 2 NZLR 554 and *Church v Commerce Club of Auckland* [2006] NZAR 494, *Hopper v North Shore Aero Club Inc* (Court of Appeal, 14 November 2006, CA11/06), *Philip A Joseph Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 749.

²¹⁰ *Dunne v Canwest TVWorks Ltd* [2005] NZAR 577. However, see criticism of the contextual evaluation and application of increased scrutiny: Dean R Knight, “*Dunne v Canwest TVWorks Ltd*: Enhancing or Undermining the Democratic and Constitutional Balance?” (2005) 21 NZULR 711. Compare *Mangu v Television New Zealand Ltd* (5.09.2005, CIV-2005-404-004875, Lang J) where an editorial decision was not subject to review (and where the broadcaster was institutional public).

²¹¹ *Wilson v White* [2005] 1 NZLR 189.

²¹² *Challis v Destination Marlborough Trust Board Inc* [2003] 2 NZLR 107.

²¹³ *Singh v Auckland District Law Society* [2000] 2 NZLR 604.

²¹⁴ Taggart, “Administrative Law”, above n 133, 92.

²¹⁵ *Ibid.*

- the (public) identity of bodies undertaking comparable functions, either locally or in other jurisdictions;
- the effect of the decision, either in terms of public or nation generally or grave effects on the individual;
- the (non-)availability of other remedies.

Private bodies making private decisions

This category of case does not deserve mention in an administrative law treatise. Public law should not be concerned with private bodies making private decisions. Such matters are quintessentially matters for private law. Regrettably, as noted above, our public law courts have asserted jurisdiction – in some cases, co-extensive jurisdiction – to review such actions. Such an approach must be erroneous.

Of course, that is not to say that the public law and private law should not be ignorant of developments in either jurisdictions. As noted earlier, some argue that the values underlying each are similar.²¹⁶ As a matter of doctrine, there is some inevitable spill-over. Notable examples of partial harmonisation of public and private law might include process contracts in tendering cases,²¹⁷ natural justice principles applicable in the employment context,²¹⁸ estoppel principles in public law cases.²¹⁹ But it is one thing for such a development to be accepted as being a proper development for that body of law; it is another thing for it to be unilaterally imposed by stealth, due to the application of rules intended to regulate procedure only.

²¹⁶ Oliver, above n 103.

²¹⁷ See, for example, the application of the duty of good faith and fair dealing in *Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433 (albeit not to the same high, administrative law standard).

²¹⁸ See B. Boon, “Procedural Fairness and the Unjustified Dismissal Decision”, (1992) 17 NZ Journal of Industrial Relations.

²¹⁹ Challis, above n 212.