

**WORKING PAPER**

## **Privately Public**

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# Privately Public

*Dean R Knight\**

## ***I Introduction***

When are – or should – the actions of private bodies subject to the scrutiny in our public law courts?

The scope of judicial review, in the sense of who should be subject to the supervisory jurisdiction of judicial review, presents a vexed question for our common law courts. It is well known that changes to the way the state goes about its business has led to a change of focus for administrative law, "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".<sup>1</sup> The jurisdictional gateway into judicial review – the entry point into the formal arena where the principles of good administration are championed – has been renovated. No longer is an *institutional approach* seen to be fit-for-purpose.<sup>2</sup> Regulating entry in the administrative law courts solely on the formal identity of the impugned body (is it an organ of the state?) and on the source of power is no longer adequate. That approach is now condemned as formalistic, out-dated, and under-inclusive. In came the *functional approach*, with a focus on the substance and nature of the decision (is the function a public or governmental function?).<sup>3</sup> Or, perhaps, more aptly, the *contextually functional* approach – one which blends the two – is a more accurate description of current jurisprudence.<sup>4</sup>

In the new era of the functional and contextual functional approaches, the tricky task is giving meaning to the notion of public or government function – or "publicness". Absent the readily identifiable form inherent in the institutional approach, on what basis and according to what criteria should an action be classified as functionally public such that it can be reviewed according to the principles of public law? In particular, when should the actions of private entities be drawn into the domain of public law?

This is a difficult and crucial question – and one that risks remaining unanswered by the New Zealand courts. The Judicature Amendment Act 1972 (the "simplified and streamlined

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<sup>1</sup> Peter Cane, *Administrative Law* (4th ed, Oxford University Press, Oxford, 2004) at 5 and 7.

<sup>2</sup> Cane, *Administrative Law*, at 3; Cane, "Accountability".

<sup>3</sup> Cane, *Administrative Law*, at \_\_\_\_.

<sup>4</sup> Cane, *Administrative Law*, at \_\_\_\_.

procedure"<sup>5</sup> for judicial review) has distracted some of our courts away from the critical considerations engaged by the question of amenability to review. Their formulaic application of the provisions of the Judicature Amendment Act 1972 – without more and, importantly, without reference to the common law concept of publicness – has seen an expansion in the reach of administrative law. There are increasing instances of our courts insisting that incorporated societies and other corporate bodies constituted under statute comply with the principles of good administration found in public law. Sometimes this incursion into the private realm is considered and justified by reference to the purpose and principles of public law. In others, the approach adopted by the courts sees this question of amenability to review being answered *without* reference to the publicness of the private body or their actions (however that is or should be defined).

In this paper, I explore the puzzle of the relevance of JAA72 to the question of amenability to judicial review, through the lens of the reviewability of incorporated societies and other private corporate entities. Conflicting decisions of the Court of Appeal on this point provide an entry point into the analysis of the proper relationship between common law review and review under the statutory recognition of judicial review in the JAA72. I argue that the JAA72 cannot be regarded as conferring jurisdiction on the courts to engage in judicial review without reference to the underlying parameters of the common law. The text and purpose of the JAA72, along with policy and constitutional considerations, all point to the JAA72 as being procedural in form and not obviating the need for courts to engage in an evaluation of the publicness of private entities before they subject them to review.

This paper looks at the jurisdiction to engage in judicial review. Talking about *jurisdiction* seems to have become somewhat unfashionable. It sits uncomfortably with the simplicity project which has dominated New Zealand jurisprudence for over 20 years. But, as I demonstrate, the seizure of jurisdiction in these marginal cases is not merely a technical matter and brings with it significant downstream consequences.

## ***II A Conceptual Puzzle: The Relevance of the JAA72 to the Amenability of Private Incorporated Societies to Judicial Review***

This issue has been simmering for some time but has come into the spotlight of late following two contradictory decisions of the Court of Appeal addressing proper approach for determining whether the decisions of a private incorporated society can be subject to judicial review, particularly the influence of the Judicature Amendment Act 1972. In the first, *Hopper v North Shore Aero Club*, the Court doubted whether the Judicature Amendment Act 1972 permitted the judicial review of an incorporated society unless there was some “public aspect” to its activities.<sup>6</sup> Even if the society’s actions might fall within a literal reading of the exercise of statutory power under the JAA72, the Court’s provisional view was that this was not enough to allow the Court to review the society on public law grounds. In the second case, *Adlam v Stratford Racing Club*,<sup>7</sup> a differently constituted Court rejected an argument, based on the dicta in *Hopper*, that the private character of a club and its activities prevented judicial review. In doing so, the Court endorsed the ruling of Miller J in the High Court that the society was amenable to judicial review, a ruling which was based on mere compliance with the legislative definition of the

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<sup>5</sup> Michael Taggart, "Introduction to Judicial Review in New Zealand" [1997] JR 236 at 236.

<sup>6</sup> *Hopper v North Shore Aero Club* [2007] NZAR 354.

<sup>7</sup> *Adlam v Stratford Racing Club* [2008] NZAR 329.

exercise of statutory power in the JAA72. While both cases address this rarely tackled issue, the brief discussion in *Hopper* was tentative and the analysis in *Adlam* was rather cursory. As a consequence, neither case definitively resolved the point and the issue remains live.

### 1 *Hopper: “publicness” is essential*

The backdrop to the *Hopper* case was the refusal by an aero club to allow a member to base an experimental aircraft at the club's airfield. Mr Hopper sought judicial review of the decision of the incorporated society on the grounds of ultra vires, natural justice, legitimate expectation, and unreasonableness.

Initially in the High Court, Hugh Williams J ruled that the actions of the club were subject to judicial review jurisdiction by dint of the fact that the actions of the club satisfied the broad definition of the exercise of statutory power in JAA72.<sup>8</sup> Hugh Williams J ruled that the club's decision was: (a) made under the club's constitution; and (b) was the exercise of a power or right requiring Mr Hopper to refrain from doing something that affected his rights – and this was “sufficient”.<sup>9</sup> Mr Hopper made it through the door into the public law courts. However, he failed to make out any grounds for review. Although Hugh Williams J noted the courts were traditionally “diffident about interfering in the actions of incorporated societies” and the precise limits of judicial involvement were “limited and imprecise”,<sup>10</sup> the judge evaluated each and every of the traditional public law grounds of review. Ultimately he ruled that none was made out.

On appeal, the Court of Appeal also agreed that none of the grounds was made out. The Court also expressed doubts about whether that a club that was not exercising a “quasi-public function” could be subject to judicial review.<sup>11</sup> Characterising Mr Hopper's claim as being about whether the club had acted in accordance with the club's rules, O'Regan J said it doubtful that “that qualifies it for review under the Act”.<sup>12</sup> Pointing to the *Phipps* case, the Court emphasised the importance of some elements of publicness to the question of amenability to review: “This Court has indicated that a power of a private entity will not normally be amendable to judicial review under the 1972 Act unless it was a ‘public’ aspect.”<sup>13</sup> Remedies in relation to the private activities of private entities were founded in contract. Although there were examples of some limited interference in the internal management or regulation of clubs, “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”.<sup>14</sup> However, as the question of amenability to review was not squarely raised in argument and was not material to the outcome in the case, the Court did not finally determine the point.

### 2 *Adlam: “publicness” irrelevant*

The *Adlam* case also concerned the actions of an incorporated society. The club was involved in an acrimonious dispute about arising from the transfer of the club's major asset, a racecourse, to a separate trust, and other management activities. Dissidents sought to overthrow

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<sup>8</sup> *Hopper v North Shore Aero Club* (High Court, Auckland, 6 December 2005, CIV-2005-404-002817) , at [27].

<sup>9</sup> *Ibid*, at [27].

<sup>10</sup> *Ibid*, at [32].

<sup>11</sup> *Hopper* (CA), at [12].

<sup>12</sup> *Ibid*, at [9].

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*, at [11].

the management committee, engaging in a membership drive in order to garner sufficient numbers to promote an alternative candidate for the club presidency. However, the incumbent faction blackballed applications for membership and rejected the nomination of the alternative presidential on the basis that it was invalidly made. Mr Adlam sought to challenge those actions, as “a member complaining of breaches of the club’s rules and as representative of a large group of intending members and users of the course”.<sup>15</sup> The judicial review challenge sought declarations about the lawfulness of the transfer of land, blackballing, and rejection of the nomination.

In the High Court it was common ground between the parties that an incorporated society was susceptible to review.<sup>16</sup> The judge agreed on the jurisdictional point, emphasising the expansive definition of statutory power in the JAA72.<sup>17</sup>

The availability of a contractual relationship, albeit implied, and associated remedies were seen, at best, as a reason for exercising remedial restraint and were ultimately rejected:<sup>18</sup> “A remedy is required”, said Miller J, “No purpose would be served, in this case, by requiring the plaintiff to reformulate his claim in contract before granting relief.” Miller J went on to rule that the gifting of the club’s main asset was contrary to the objects of the club, based on errors of law and unreasonable in the *Wednesbury* sense.<sup>19</sup> He also ruled that the blackballing and rejection of nomination were unlawful, on the basis of improper purpose and misinterpretation of club rules respectively.

On appeal to the Court of Appeal, and following the decision being released in *Hopper*, the club challenged the amenability of the decisions to review, arguing that the club was “a private entity’ whose activities were ‘private in nature’”.<sup>20</sup> The Court rejected the submission, with Chambers J saying that the decisions about blackballing were “prime candidates for review”.<sup>21</sup> While noting the traditional reluctance of the courts to intervene in the internal membership of clubs, the Court seemed concerned that prospective members might be left without a remedy: “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.”<sup>22</sup> While accepting that it was possible for Mr Adlam to mount his claim as a contractual challenge, as a member of the club, the Court said he was not bound to follow the route. “His essential complaint against the committee, namely that they were acting unfairly and for an improper purpose,” Chambers J said, “is quintessentially the stuff of judicial review”.<sup>23</sup> Notably, there was no attempt by the Court to explain their decision on amenability to review in terms of the “publicness” aspect promoted by the Court in *Hopper*. The necessary conclusion is that the Court endorsed the approach of the lower court judge that, for incorporated societies, compliance with the statutory power of decision requirements in the JAA72 was sufficient to found jurisdiction for judicial review. On the merits of the judicial review challenge, the Court of Appeal also largely

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<sup>15</sup> *Adlam v Stratford Racing Club Inc* [2007] NZAR 544, at [5].

<sup>16</sup> *Ibid*, at [78].

<sup>17</sup> *Ibid*, at [79].

<sup>18</sup> *Ibid*, at [81].

<sup>19</sup> *Ibid*, at [84].

<sup>20</sup> *Stratford Racing Club Inc v Adlam* [2008] NZAR 329 at [53].

<sup>21</sup> *Ibid*, at [54].

<sup>22</sup> *Ibid*, at [55].

<sup>23</sup> *Ibid*. Indeed, this is consistent with Chambers J’s remarks refuting the suggestion that the New Zealand Bill of Rights Act 1990 might (ironically) be engaged, and his emphasis on the applicability depending on the exercise of a “public function”.

agreed with Miller J, only differing on whether a remedy should be granted for the unlawful rejection of the nomination for the presidency of the club. While it accepted the rejection of the nomination was unlawful (and also in breach of natural justice), it ruled that granting declarations about this would be pointless.<sup>24</sup>

### 3 *Other cases: a mixed bag*

The *Hopper—Adlam* dichotomy is just the tip of the iceberg. There is a myriad of other cases in which the juridical basis for exacting private bodies to the scrutiny of the public law courts is merely assumed or inadequately conceptualised. *Hopper* and *Adlam* are just two cases where the different approaches are neatly juxtaposed. Increasingly, our courts have merely asserted or assumed the amenability of private incorporated bodies to review, without analysis or through mere satisfaction of the statutory power of decision definition in the JAA72, in a manner consistent with the Court of Appeal in *Adlam*.

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.<sup>25</sup> 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" amounting to the de facto exercise of public power, Gault J said:<sup>26</sup>

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.

His Honour's remarks were only obiter 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.<sup>27</sup>

More recent obiter comments of the Court of Appeal contain similar sentiments. In *Velich v Body Corporate No 164980*,<sup>28</sup> 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

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<sup>24</sup> Ibid, at [93] and [99].

<sup>25</sup> *Electoral Commission v Cameron* [1997] 2 NZLR 421.

<sup>26</sup> Ibid, at 429.

<sup>27</sup> Ibid.

<sup>28</sup> *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143. See similar criticism of the approach to the JAA72: Michael Taggart, "Administrative Law" [2006] NZ Recent Law 75, 99.

unreasonable withholding of consent. However, his Honour suggested the JAA72 might provide a mechanism to subject the private body to administrative law standards:<sup>29</sup>

[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 traditional principles of good administration to it.

The jurisdiction-conferring approach and absence of any assessment of the publicness of the club or its actions is also evident in a number of other cases involving incorporated societies in the High Court:

- *Church v Commerce Club*: partially successful challenge by club member that his suspension was unlawful on natural justice and bias grounds;<sup>30</sup>
- *Surfing Taranaki Inc v Surfing New Zealand Inc*: challenge by member club to election of committee members;<sup>31</sup>
- *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;<sup>32</sup>
- *Beaton v Institute of Chartered Accountants of New Zealand*: challenge to professional body constituted under its own specific legislation allowing it to promulgate its own rules.<sup>33</sup>

This is not an exhaustive catalogue of cases where the courts have merely asserted reviewability on the basis of the JAA72 and/or failed to undertake any evaluation of the publicness of the body or its actions. The increasing number of cases where the private nature of an incorporated society has not been regarded as representing an impediment to judicial review seems to have created a proliferating precedent which has also led to the point being assumed or conceded. It needs to be recorded, though, that there are still a number of cases which have engaged in the publicness assessment (however defined) expected at common law and promoted

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<sup>29</sup> *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143, [46]-[48].

<sup>30</sup> *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" (ibid, at [30]).

<sup>31</sup> *Surfing Taranaki Inc v Surfing New Zealand Inc* HC Dunedin CIV-2007-412-1063, 27 May 2008.

<sup>32</sup> *Phillips v Wairarapa Kennel Association Inc* [2005] NZAR 460.

<sup>33</sup> *Beaton v Institute of Chartered Accountants of New Zealand* (2005) 17 PRNZ 701 (HC). The analysis of reviewability was solely described in terms of compliance with the JAA72: "It is not in dispute that the powers exercisable by the Practice Review Board are statutory powers, and that the exercise of those powers constitutes the exercise of statutory powers of decision in terms of the Judicature Amendment Act 1972: *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA). The decision to conduct the investigation and the subsequent decision to lay a complaint under r 20.6(c) ... fall under the umbrella of the jurisdiction to review conferred by the Judicature Amendment Act ... "

by the Court in *Hopper*, even where the formal elements of the exercise of a statutory power definition in the JAA72 would clearly have been satisfied anyway. Some examples include the following:

- In *Dunne v CanWest TVWorks*, Ronald Young J resolves the issue of a private broadcasting company's amenability to review entirely by reference common law principles, noting that "[r]eview is not limited to public bodies exercising statutory functions".<sup>34</sup>
- When assessing the amenability of an incorporated charitable trust to review, Randerson J in *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* took the view that the JAA72 was "largely procedural and the issue as to whether the Court should intervene in administrative law in the case of a non-statutory body such as the Trust Board must still be determined".<sup>35</sup> Although the judge was satisfied that "in strict terms" the actions of the Board constituted a statutory power of decision, he was not persuaded it was exercising public powers.
- Wild J's assessment of amenability of an incorporated society to review in *Khan v Ahmed* acknowledged the dicta in *Hopper* and the need for the function to be quasi-public.<sup>36</sup> However, his Honour ruled that this was satisfied because club operated a centre which was "the focal point for the Muslim community in Hawke's Bay".<sup>37</sup> Further, the fact the case raised proprietary rights meant that "intervention under the Judicature Amendment Act [was] appropriate".<sup>38</sup>
- In *Macaskill v Ogden* Wild J ruled that the decision of an electricity trust was not amenable to judicial review.<sup>39</sup> While noting a public function was required for common law review, the judge ruled that availability of other remedies in equity weighed against the jurisdiction of judicial review being engaged.
- In *Challis*, Wild J accepted a reasoned concession that an incorporated society providing information services constituted under the Local Government Act 1974 was subject to public law.<sup>40</sup>
- In *Hayes v Logan*, Miller J spoke of the "public law quality" of a decision of the police to apply to the Liquor Licensing Authority to cancel a licensee's licence, even criminal offences on which their application was founded had been the subject of diversion, rejecting an approach framed solely in terms of a statutory power of decision under s 4 of the JAA72.<sup>41</sup>
- In *Singh v Auckland District Law Society* Nicolson J focused on public "nature and effect" of the Law Society's disciplinary powers when ruling that its actions were reviewable under the JAA72.<sup>42</sup>

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<sup>34</sup> *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 at [28].

<sup>35</sup> *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122 at [24].

<sup>36</sup> *Khan v Ahmed* [2008] NZAR 686.

<sup>37</sup> *Ibid*, at [55].

<sup>38</sup> *Ibid*.

<sup>39</sup> *Macaskill v Ogden* [2009] NZAR 111.

<sup>40</sup> *Challis v Destination Marlborough Trust Board Inc* [2003] 2 NZLR 107.

<sup>41</sup> *Hayes v Logan* [2005] NZAR 150.

<sup>42</sup> *Singh v Auckland District Law Society* [2000] 2 NZLR 604 at [54].

- In the High Court decision in *Diagnostic Medlab Ltd v Auckland District Health Board*, Asher J said took the approach that the satisfaction of the statutory power definition was described as "not controlling in a determination whether a body is subject to judicial review", with the assessment requiring consideration of the source and consequences of power being exercised.<sup>43</sup>

The existence of the two lines of authority, neither of which particularly engages with each other, reinforces the fact that the resolution of this fundamental question is of some moment. The reach of judicial review is slowly creeping in the private domain, without this revolution being subjected to the conceptual and principled analysis it requires.

### ***III The issue in context: relationship between common law review and statutory review***

In order to develop this issue further, it needs to be located within its broader context. This issue is not merely about whether or not the decisions of incorporated societies are subject to review (as important as that question is to some).<sup>44</sup> Nor is it an immaterial debate about what label to post above the courtroom door when courts are engaged in review. It is not a trivial or esoteric point capable of being swept away in the name of simplicity or indifference to matters technical.

First, the dichotomy of approaches raises the fundamental constitutional question about the source of the courts' jurisdiction to engage review and, particularly, the relationship between the underlying review jurisdiction of the superior courts and legislative steps to modify or codify that jurisdiction. It reignites questions about the nature and effect of the JAA reforms in the 1970s. Secondly, it is not simply a debate about jurisdiction and entry into a courtroom. Characterising a challenge to a decision as being judicial review in nature not only influences the *availability* of supervisory review but also affects the *norms* basis on which that review is undertaken. The standards, principles and doctrines regulating public and private behaviour – while sometimes being drawn from common values<sup>45</sup> – are different. There may be legitimate calls for them to be harmonised, especially at the boundaries of the public–private divide. But such reform should not be undertaken by stealth, through the summary resolution of a jurisdictional question. Any doctrinal developments deserve and require greater deliberation.

So far, the analysis of the competing approaches has been explained in terms of the relevance or otherwise of "publicness" to the question of amenability to review and the sufficiency or otherwise of establishing that an action amounts to the exercise of a statutory power of review under the JAA72. For analytical purposes, the different approaches can be associated with the different vehicles for judicial review. As is well-known, there are presently two different routes to judicial review in New Zealand:<sup>46</sup>

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<sup>43</sup> *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832 (HC) at [9]. On appeal, jurisdiction to review was conceded by the parties, with the focus being on the method of review: *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 at [361].

<sup>44</sup> See Law Commission, *Review of the Incorporated Societies Act 1908* <[www.lawcom.govt.nz/project/review-incorporated-societies-act-1908](http://www.lawcom.govt.nz/project/review-incorporated-societies-act-1908)>.

<sup>45</sup> Dawn Oliver, "The Underlying Values of Public and Private Law" in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) and Dawn Oliver, *Common Values and the Public–Private Divide* (Butterworths, London, 1999).

<sup>46</sup> Of course, a decision may, in some circumstances, also be collaterally challenged according to administrative law principles in other proceedings, such as a prosecution or private law claim. See Taylor,

- (a) orders based on the old prerogative writs or other extraordinary remedies, available under Part 30 of the High Court Rules (sometimes called "common law review"); and
- (b) an application for review under s 4 of the Judicature Amendment Act 1972 (sometimes called "statutory or JAA review").

The critical question is the source of the courts' *jurisdiction* to review for each of these vehicles. (Here, I prefer the language of "jurisdiction", rather than the language of "justiciability". As Finn explains, the two concepts are analytically distinct.<sup>47</sup> Unfortunately, the terms are often used interchangeably or collapsed into a single assessment of whether to intervene or not.)

The *Hopper* approach is grounded in the common law. The jurisdiction to review at common law is generally regarded as being "conterminous with the limits of public power", as expressed by the jurisprudence of the courts.<sup>48</sup> At this point, I am not delving into the ultra vires versus common law debate about the source of the common law courts to articulate those limits.<sup>49</sup> For present purposes, adopting a position on this continuing debate is not needed because the two different schools that dominate both acknowledge that it is proper role of the courts to express those limits, subject ultimately to any legislative modification.<sup>50</sup> Under approach championed in *Hopper*, the requirements of the common law must be established in both common law review and review under the JAA72. Jurisdiction continues to be determined according to the parameters articulated by the common law courts – that is, in broad terms, based on "publicness". In contrast, the *Adlam* approach seeks to justify its jurisdiction by reference to the direct conferral of the supervisory power by legislation. That is, the jurisdiction to review comes from the JAA72 itself, independent of the underlying position at common law.

The constitutional question then becomes more obvious. What was the effect of the Judicature Amendment Act 1972 on the power to undertake judicial review? In the terms used by Professor Taggart some time ago,<sup>51</sup> was the JAA72 intended to be *procedural* only, offering a more sympathetic procedural vehicle than the prerogative writs to engage the underlying judicial review jurisdiction at common law (ie, the *Hopper* approach)? Or was the JAA72 intended to be *jurisdiction-conferring*, provide an – or another – independent source of authority to engage in judicial review (ie, the *Adlam* approach)?

That question needs to be considered in the light of the text, history and purpose of the JAA72. In my view, all these factors unequivocally support the procedural approach and point to *Hopper* as articulating the preferred approach to amenability to review.

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*Judicial Review in New Zealand* at [6.11] and Dean R Knight, "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 117.

<sup>47</sup> 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 at 144.

<sup>48</sup> Ibid.

<sup>49</sup> See Forsyth (ed), *Judicial Review and the Constitution*; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford, 2001); and Paul Craig "Fundamental Principles of Administrative Law" in David Feldman (ed), *Public Law* (Oxford University Press, Oxford, 2004)

<sup>50</sup> TRS Allan, "The Rule of Law as the Foundation of Judicial Review" in Forsyth (ed), *Judicial Review*, at 91.

<sup>51</sup> Taggart, "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] NZ Recent Law 356.

## 1 Long-standing common law jurisdiction, supported by procedural rules

Judicial review in New Zealand was “derived from the English common law prerogative writs and the public law manifestations of the provisions for declaratory and injunctive relief”.<sup>52</sup> Mandamus allows the court to compel a decision-maker to perform a public duty.<sup>53</sup> Prohibition allows the court to prohibit a decision-maker from undertaking action or exercising some jurisdiction.<sup>54</sup> The variation or quashing of a decision is enabled by the writ of certiorari.<sup>55</sup> The other extraordinary remedies complement the old prerogative writs.<sup>56</sup> An injunction allows the court to restrain a decision-maker from breaching a duty.<sup>57</sup> The declaration remedy, generally regarded as incorporating the powers in the Declaratory Judgments Act 1908, allows the court to issue a formal statement about the law applicable to any situation.<sup>58</sup> Individually, each extraordinary remedy addresses different circumstances. Collectively, the suite of extraordinary remedies appear to provide broad potential to address the misuse of public power.

Procedural rules have recognised and supported these common law remedies and provide a portal for common law principles of judicial review.<sup>59</sup> The form of this procedural recognition has changed over time.<sup>60</sup> However, the principle has been the same: the rules support the pre-existing remedies, without attempting to modify or codify them or the circumstances in which they must be exercised. The common law itself addresses the latter.

Nowadays, these writs and remedies continue to be recognised by Part 30 of the High Court Rules (branded with the modern term “Judicial Review”).<sup>61</sup> The old prerogative writs and other extraordinary remedies are listed in an interpretative provision:<sup>62</sup>

### 30.2 Interpretation

In this Part, extraordinary remedy means—

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<sup>52</sup> Law Commission, *Mandatory Orders Against the Crown and Tidying Judicial Review*, at 14. See also McGechan on Procedure, at [HRPt30.01(2)]. See generally Peter Cane “The Constitutional Basis of Judicial Remedies in Public Law” in Peter Leyland and Terry Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, Oxford, 1997) 242.

<sup>53</sup> Taylor, at [5.41].

<sup>54</sup> Taylor, at [5.42].

<sup>55</sup> Taylor, at [5.40].

<sup>56</sup> Injunctions, declarations and 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 19 of the High Court Rules). See de Smith, 780 ff and Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 1058 ff.

<sup>57</sup> Taylor, at [5.44].

<sup>58</sup> Taylor, at [6.02]; Law Commission, *Judicial Review*, at fn 54. Cane identifies two different types of declarations: “surrogate declarations” (non-coercive alternative to issuing another prerogative writ or order) and “autonomous declarations” (a declaration about the law on a particular topic): Cane, “Judicial Remedies”, at 243.

<sup>59</sup> Taylor, [5.36].

<sup>60</sup> Two particular modifications are worthy of note. First, prerogative writs were converted into prerogative orders in 1985: Judicature Amendment Act (No 2) 1985, s 8). Secondly, the latest recognition of prerogative writs removed extraneous language from the provisions recognising the prerogative writs (see Appendix 1 for the provisions that applied before amendment). See Taylor, *ibid*.

<sup>61</sup> At the time of the *Hopper* and *Adlam* decisions, the equivalent procedural support was provided by Part 7 of the High Court Rules.

<sup>62</sup> High Court Rules, r 30.2.

- (a) an order of mandamus, prohibition, or certiorari;
- (b) a declaration or injunction in relation to the breach, threatened breach, continuation of a breach, or further breach of a duty of a court, tribunal, or person exercising public functions;
- or
- (c) an order removing a person from public registry or a declaration as to the right of a person to hold a public registry.

A separate provision then provides that such extraordinary remedies must be commenced in the same way as other proceedings, by statement of claim and notice of proceeding.<sup>63</sup>

## 2 *JAA72 (and JAA77) reforms: Special treatment of review of the exercise of “statutory power”*

Well-known concerns that the prerogative writs and orders were cumbersome for applicants and provided no sympathy for applicants seeking the wrong writ lead to procedural reform of the writs in the 1970s and the introduction of the simplified judicial review procedure in the JAA72.<sup>64</sup> The critical provision, s 4 of the JAA72, allows the High Court to grant any relief available under the prerogative writs or other extraordinary remedies in relation to “in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a *statutory power*” (a phrase now defined extensively).<sup>65</sup> In general terms, s 4 provides a more sympathetic environment in which to engage judicial review. It avoids the procedural complexities associated with the prerogative writs.<sup>66</sup>

The definition of statutory power was originally defined solely legislative terms, namely, “a power or right conferred by or under any Act” to do various things. The equivalent “statutory power of decision” in s 3 was similarly defined. No doubt this was because until then, the common law had adopted a formalistic, institutional approach to the question of jurisdiction at common law – bodies were only amendable to review if their powers were sourced in statute. However, an amendment in 1977 extended the definition of statutory power to include powers conferred by some other non-statutory instruments.<sup>67</sup> In addition to the power conferred by legislation, the term statutory power was extended to power conferred “under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate”.<sup>68</sup> The character of the person or body exercising the power has always been broadly framed. The definition of “person” in s 3 includes “a corporation sole, and also a body of persons whether incorporated or not”.

The effect of these sections is – at least, in institutional terms – to cast the net quite 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

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<sup>63</sup> High Court Rules, r 30.3

<sup>64</sup> Law Commission, *Judicial Review* at [49]; Law Commission, *Prerogative Writs* at [1.10].

<sup>65</sup> JAA72, s 4 (emphasis added). The one exception is removal from office, which while an extraordinary remedy under Part 30, is not referred to in s 4 of the JAA72.

<sup>66</sup> See Public and Administrative Law Reform Committee *Administrative Tribunals Constitution, Procedure and Appeals: Fourth Report* (Wellington, Government Printer, January 1971).

<sup>67</sup> Judicature Amendment Act 1977, s 10.

<sup>68</sup> Oddly, the extension was extended in both the definition of statutory power *and* statutory power of decision, even though the extension in the parent definition would have flowed through into the latter definition.

unincorporated bodies.<sup>69</sup> In most cases, the ambit of JAA72 review will be wide enough to cover the typical applications for judicial – 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.<sup>70</sup>

### 3 *Effect of the JAA72 (and JAA77) amendments*

But what is the relationship between the JAA72 and common law review? Text, purpose, and general scheme all point to it being of limited procedural effect, not jurisdiction-conferring.<sup>71</sup>

First, the text of s 4 links review under the JAA72 to common law review. The courts are empowered to grant “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”.<sup>72</sup> While this avoids the historic conundrum of needing to select the singularly most appropriate writ, it does not obviate the need to identify that such relief would have been available under the prerogative writs or extraordinary remedies. The reference to entitlement to that relief would seem to capture both the remedial orders that could be granted and the circumstances in which those orders would be granted. Rather than freezing the then common law position in relation to the prerogative writs and other extraordinary remedies, this has been understood to be ambulatory in nature. As Taylor put it, the courts “may, of course, develop and expand the grounds on and the circumstances in which judicial review can be obtained”, although he records in a footnote that there is no authority for this “because every judge, so far as the author is aware, has proceeded on this basis and never questioned it”.<sup>73</sup>

Secondly, the procedural approach is supported by the purpose of the reforms, as evidenced by the reports of law reform committees who promoted those reforms at the time. The architects of the change made it clear that the reform was procedural only and was not intended to make substantive changes to the common law jurisdiction.<sup>74</sup> The new legislation did “not attempt, as it might have done, to codify the grounds of an application or to enumerate the tribunals to which the new procedures apply or in any other way to alter ... the remedy that may be granted on such an application”.<sup>75</sup> There was some expectation or hope that these writs would become redundant,

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<sup>69</sup> 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) [165] and Taylor, at [5.23].

<sup>70</sup> See below n \_\_\_\_.

<sup>71</sup> I note here the different conclusion, adopted in passing, in Rowan Anderson, "The Whistle Has Blown ... Game Over ... Or is it?" (2008) 14 *Canta LR* 65.

<sup>72</sup> JAA72, s 4 (emphasis added).

<sup>73</sup> Taylor, at [5.17]. See also Michael Taggart, "State-Owned Enterprises and Social Responsibility: A contradiction in terms?" [1993] *NZ Recent Law Review* 343 at 356-359.

<sup>74</sup> Public and Administrative Law Reform Committee *Administrative Tribunals Constitution, Procedure and Appeals: Fourth Report* (Wellington, Government Printer, January 1971) at 7. The Committee noted that it "decided at this stage to concentrate upon improvement of the procedure to obtain review, leaving the substantive law untouched". On the reforms generally, see David Mullan "Judicial Review of Administrative Action" [1975] *NZLJ* 154.

<sup>75</sup> Public and Administrative Law Reform Committee *Administrative Tribunals Constitution, Procedure and Appeals: Fifth Report* (Wellington, Government Printer, January 1971) at 7. The one exception, noted by

with the JAA procedure becoming the ordinary means of reviewing administrative action.<sup>76</sup> Similarly, the 1977 reforms which expanded the meaning of statutory power were consistent with the procedural approach of the earlier reforms, with the enlargement of the definition of the term statutory power being merely to "enable relief to be granted ... if any one of the five remedies named in s 4(1) might have been available hitherto".<sup>77</sup>

Thirdly, high authority considering the general scheme of the JAA72 supports the procedural approach. Following the reforms, there was initially some uncertainty about whether the JAA72 might radically alter the judicial review jurisdiction in New Zealand or cause it to depart company from its parent. In *Daemar v Gilliland*, an early case discussing the effect of the JAA72 following the 1977 amendments but rarely cited nowadays on this point.<sup>78</sup> "[A]n application for review under the 1972 Act cannot succeed", Cooke J said, "unless the applicant could have been granted, apart from the Act, some remedy by way of mandamus, prohibition, certiorari, declaration or injunction."<sup>79</sup> In contrast, concerned about the policy and practical implications for private entities of the expansive definitions in the JAA72, the Court of Appeal in *New Zealand Stock Exchange v Listed Companies Association Inc* adopted a narrow approach to the definition of statutory power. In doing so they operated on the basis that the JAA72 was jurisdiction-conferring and left at large the "rather amorphous suggestion" that judicial review might still be available without recourse to the Judicature Amendment Act.<sup>80</sup> The jurisdiction-conferring approach was also later hinted at by Cooke J in *Budget Rent A Car Ltd*.<sup>81</sup> Cooke J then spoke of the reforms as making New Zealand administrative law "significantly indigenous" and warned against assuming that English law was necessarily incorporated into New Zealand law "without recognition of the Judicature Amendment Act 1972".<sup>82</sup>

There is, however, a strong case for saying the point was resolved beyond doubt by the Privy Council's judgment in *Mercury Energy* in the famous case addressing the amenability of a commercial decision of an SOE to review.<sup>83</sup> The case in the Court of Appeal had been resolved on the basis that the termination of the electricity supply contract was not the exercise of a statutory power and therefore was not amenable to review.<sup>84</sup> On appeal, this position was maintained by the SOE; however, it was also conceded that the existence of the JAA72 did not take away the power to review under the prerogative writs. The Privy Council accepted that concession and allowed the challenge to be re-pleaded as common law review where one of the prerogative writs was sought. Ultimately, though, the Privy Council went on to rule that the decision was amenable to review

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the Committee, was the power to refer a matter back to the decision-maker for consideration and power to validate a technical invalidity or defect in form.

<sup>76</sup> Public and Administrative Law Reform Committee *Administrative Tribunals Constitution, Procedure and Appeals: Fourth Report* (Wellington, Government Printer, January 1971) at [26].

<sup>77</sup> Public and Administrative Law Reform Committee *Administrative Tribunals Constitution, Procedure and Appeals: Eighth Report* (Wellington, Government Printer, 1975) at [26]. See JA Smillie "The Judicature Amendment Act 1977" [1978] NZLJ 232.

<sup>78</sup> *Daemar v Gilliland* [1981] 1 NZLR 61. See a similar approach in *Melentyev v Beatson* [1990] 1 NZLR 416.

<sup>79</sup> *Daemar v Gilliland*, *ibid*.

<sup>80</sup> *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699 at 707.

<sup>81</sup> *Budget Rent A Car Ltd v Auckland Regional Council* [1985] 2 NZLR 414 (CA), *Webster v Auckland Harbour Board* [1983] NZLR 646, and *Webster v Auckland Harbour Board* [1987] 2 NZLR 129.

<sup>82</sup> *Budget Rent A Car*, *ibid*, at 418.

<sup>83</sup> *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385 (PC).

<sup>84</sup> *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551 (CA).

under both the common law and the JAA72. As Professor Taggart argued, by implication, these rulings support the procedural approach.<sup>85</sup> First, the recognition of coextensive jurisdictions suggests that JAA72 does not act as a substantive code. Secondly, if the JAA72 is not a substantive code, then it must therefore only regulate procedure and it cannot otherwise extend or modify courts underlying supervisory jurisdiction. Thirdly, if the underlying supervisory jurisdiction is not affected by legislation, then applicants relying on JAA72 must (first) establish that they are entitled to common law review.

Fourthly, policy or constitutional considerations also support the procedural approach. A merely literal interpretation of the JAA72 (putting to one side the textual argument above), would mean judicial review would be limitless: judicial scrutiny without borders. Under the jurisdiction-conferring approach, any corporate entity – however private – falls within the reach of s 4 of the JAA72.

Take, for example, a decision of Vodafone New Zealand to increase prices or prevent communication of hate speech over its network. Vodafone, as a body corporate, is a person. Vodafone is exercising a statutory power, namely, (a) it is exercising the power to enter into and vary a contract; (b) that power being conferred under Vodafone's constitution or other instrument of incorporation (adopting the liberal interpretation now predominant under the JAA72); (c) that power is a statutory power of decision in that it affects the rights, privileges or liabilities of that customer. Therefore, absent any resort to common law principles of amenability, this decision by Vodafone would be reviewable by judicial review. This is an extraordinary – but unavoidable – conclusion. Indeed, concerns about the reach of judicial review into the commercial domain in this way originally led some courts to read the legislative requirements in the JAA72 narrowly (although this narrow approach has, rightly, fallen out of favour).<sup>86</sup> Working the jurisdictional-conferring approach through to its natural conclusion must weigh heavily against its propriety.

Of course, with such a wide jurisdictional gateway into public law, it is possible to argue that public law will ameliorate this through deploying less intensive review or address it through the secondary question of justiciability. If the same point can be reached, on the one hand, by casting the jurisdictional net wide but then applying entirely deferential review as, on the other hand, carefully assessing the limits of the jurisdictional net, then so what?

Surely, though, this cannot be an adequate answer. First, even if the instrumental reach of administrative law into private law is moderated by doctrine, it would represent a vast assumption of judicial power, which risk upsetting the constitutional balance within the common law. Secondly, such power could well become irresistible to judges wishing to address abuses in the traditional private law domain. There is no guarantee that there would not be creepage: from zero-intensity to low-intensity review to full-blown review. Such instrumentalism can be seen elsewhere in administrative law and indeed the common law generally. Thirdly, variable intensity of this kind and these circumstances is yet to be fully accepted in the administrative law orthodoxy.

To develop the last point some more, we can look beyond the jurisdictional question and examine the method of review in the marginal public-private cases. This is, as Freeland describes

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<sup>85</sup> Michael Taggart, "Corporatisation, contracting and the courts" [1994] Public Law 354.

<sup>86</sup> See for example *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699 at 707 where Woodhouse P warned that: "Whatever may be the position concerning the actual exercise of a statutory power to contract Parliament could never have intended that any corporate body recognised by statute or owing its existence to a specific or general statute such as the Companies Act could have all its commercial operations subject to constant judicial review."

it, the *doctrinal or substantive dimension* to the public-private divide.<sup>87</sup> The authorities are quite mixed on the method and intensity of review of the cases which lie at the margins. One might expect that review at the outer-reaches might generally be light-handed. However, while there are some instances where the intensity of review has been varied – both less intense and more intense – there are many instances the courts simply apply orthodox review once jurisdiction is established. That is, the private bodies drawn into public law's supervisory jurisdiction are expected to comply with the orthodox principles of good administration: they must act reasonably, fairly and in accordance with the law.

Looking first at variable intensity of review, this has been feature of the English incursion in the public-private margins. The seminal case, *Datafin*, demonstrates this well – although the doctrinal dimension to the case is often overlooked. In approaching the reviewability of the quasi-public exercise of power, the Court of Appeal intimated a more deferential approach was mandated in relation to each of its functions: "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".<sup>88</sup> As legislator, complaint could only be made if its rules failed to its self-proclaimed principle of "doing equity between one shareholder and another".<sup>89</sup> As interpreter of its own rules, "considerable latitude" would be given "because, as legislator, it could properly alter them at any time" and because of the rules were framed in the form of principles, not strict rules.<sup>90</sup> Decisions on dispensations from the rules could only be questioned if the Panel's motivation failed to accord with its paramount principle of "doing equity". Finally, in its disciplinary role, a lack of bona fides was the touchstone, along with any breach of natural justice. The existing grounds for intervention were therefore significantly circumscribed. Intervention was only justified in narrow circumstances – significantly de-powering the scrutiny by the court of the Panel's actions. In a subsequent case involving the Panel, the Lord Donaldson famously collapsed this variability into an instinctive trigger for intervention: [something gone wrong etc].<sup>91</sup> This more contextual basis for intervention potentially captures both more and less intensive review.

There are a limited number of domestic examples where this type of variation has been deployed. More intensive scrutiny can be seen in the *Cameron* and *Dunne* cases. In *Cameron*, after intimating that the Advertising Standards Complaints Board was potentially reviewable, the Court of Appeal indicated it would likely adopt a more nuanced – and more intensive – approach to review, rather than the traditional grounds of review:<sup>92</sup> "Decisions of unincorporated bodies exercising public regulatory functions may not easily fall for examination on conventional grounds of illegality, irrationality and procedural impropriety." Given the unusual circumstances of the case (particularly the potentially overlapping jurisdictions of the board and its governmental sibling, the Broadcasting Standard Authority) and constitutional dimension (the case involving the

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<sup>87</sup> Mark Freedland, "The Evolving Approach to the Public/Private Distinction in English Law" in Mark Freedland and Jean-Bernard Auby (eds) *The Public Law/Private Law Divide* (Hart Publishing, Oxford, 2006) 93 at 108. Freedland's focus is on the different rules and principles applying to public and private respectively. However, it might also seem to capture not just the rules and principles themselves, but also the intensity in reviewing compliance. This division aligns with Hickman's analytical distinction between *standards of legality* and *standards of review*: Hickman, *Public Law After the Human Rights Act*, at \_\_\_\_.

<sup>88</sup> *Datafin*, at 841.

<sup>89</sup> *Ibid*, at \_\_\_\_.

<sup>90</sup> The Court also addressed the remedial dimension, noting that the Court may only be inclined to issues a declaration of the meaning of the words, not moving to quash the decision: *ibid*, at \_\_\_\_.

<sup>91</sup> *Ibid*, at \_\_\_\_.

<sup>92</sup> *Ibid*, at 430.

state-mandated information campaign for the upcoming MMP referendum), Gault J indicated the Court would police the proper reach of the complaints board's jurisdiction strictly – forming its own view on whether it had (self-)set its jurisdictional limits properly. Similarly, in *Dunne*, Ronald Young J showed no sympathy towards the actions of TV3 to exclude two political leaders from minor parties from its election debate.<sup>93</sup> The finding of unlawfulness was justified on the basis that the decision was arbitrary and unreasonableness – in its more intense, "hard look" formulation.<sup>94</sup>

Beyond these headlines cases, however, other courts have not addressed the appropriate intensity of review in such case and have failed to tailor the form of review to the circumstances. The full gamut of the principles of good administrative, calibrated in the traditional way, is frequently deployed. For example, following the Court of Appeal's decision on standing in the *Finnigan* case,<sup>95</sup> the High Court judge hearing the substantive case for an injunction assessed whether the Union has acted "reasonably as well as honestly, paying regard to relevant considerations for the benefit of New Zealand rugby and [had not been] influenced by irrelevant matters in its decision".<sup>96</sup> Casey J noted that this was going beyond the ordinary expectations imposed on a private bodies (honestly and in good faith in furthering its objects) and was akin the standards ordinarily imposed on statutory bodies. In other words, although a private law action, not a judicial review proceeding, the principles of public law were imposed on the Union's actions. Given the public law character of the Court of Appeal's approach to standing, this might well be forgivable. But the point here is that no latitude or variable was deployed in the doctrinal dimension of the case.

Other cases involving incorporated societies have also engrafted the principles of good administration from public law on top of more modest law usually regulating societies. Private law, through the device of contract, typically only insists that a society act in accordance with its constitutional mandate and otherwise in good faith.<sup>97</sup> However, dissatisfied members able to make it through the door into the public law courts have been able to successfully arguments of unreasonableness, failure to comply with the principles of natural justice, and bias. The courts have judged the actions of private clubs against the standards expected of public bodies.

This is further evidence of the significance of jurisdictional gateway. Not only does it guide whether a person's actions may be complained about and the form that complaint takes, it also has the substantive effect of re-configuring the underlying norms and principles that are to be expected of those bodies. Professor Watts has rightly criticised, from a private law perspective, the *Adlam* decision, arguing that in effect the Court of Appeal invented a new tort of refusing to contract.<sup>98</sup>

In many respects, *jurisdiction* is a Trojan horse. The freedom of the private domain is replaced with the refrain of good governance. But these private entities drawn into the public law

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<sup>93</sup> *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577.

<sup>94</sup> *Ibid*, at [43].

<sup>95</sup> *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159.

<sup>96</sup> *Finnigan v New Zealand Rugby Football Union Inc (No 2)* [1985] 2 NZLR 181 at 186

<sup>97</sup> See for example *Henderson v Kane and the Pioneer Club* [1924] NZLR 1073; *Turner and Another v Pickering* [1976] 1 NZLR 129 and *Incorporated Societies and Other Associations* (Laws of New Zealand) at [27].

<sup>98</sup> Peter Watts, "The Tort of Refusing to Contract?" (2008) 14 NZBLQ 69.

courts find it difficult to live up to expectations drawn from a more bureaucratic sphere. Institutionally they operate with a different character and, perhaps, with different values.<sup>99</sup>

This discussion of the doctrinal or substantive dimension of the limits of public law should not, though, be interpreted as a call for rigid bifurcation or ossification. I am not contending that public law and private law should be ignorant of developments in either jurisdiction. As a matter of doctrine, there is some inevitable spill-over.<sup>100</sup> But the central point here is the consciousness of the cross-fertilisation and justification for any development. 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. The jurisdiction-conferring approach carries with it more than just a jurisdictional question of whether the court's supervisory jurisdiction should apply to certain bodies – it radically reconceives the law's expectations of, and demands on, those bodies.

Returning, finally, to the constitutional dimension of the jurisdiction-conferring and procedural approaches. The jurisdiction-conferring approach would have the effect of varying the courts' inherent jurisdiction on judicial review. From a constitutional perspective, this is a quite controversial. The two most popular conceptions of the constitutional foundations of judicial review both accept or concede that theoretically Parliament, as sovereign legislator, may modify or exclude the principles of judicial review.<sup>101</sup> But there remain some strong common law proponents who perceive the courts' supervisory jurisdiction as being entirely sacrosanct.<sup>102</sup> Personally, I think it is difficult to contend that the judicial review jurisdiction must be entirely immune from the legislator's pen, when so much of judicial intervention is already shaped by the output of the legislature. But that is by-the-bye.

For present purposes, it is sufficient to note this continuing debate and to query the absence of this debate from the present question. Because varying the underlying jurisdiction of judicial review is exactly what the jurisdiction-conferring approach seeks to do – albeit largely through enlargement. But it could as easily be through restriction as well. Elsewhere, in relation to the interpretation of privative clauses for example, the courts have been quite vigilant to protect their underlying judicial review jurisdiction from legislative abscission.<sup>103</sup> Indeed, recently, judicial concerns about further legislative reform of the framework for judicial review are understood to have led to the proposals being put on the back-burner.<sup>104</sup> The Law Commission had proposed that

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<sup>99</sup> Cane, *Administrative Law*, at 13. Compare Dawn Oliver, "The Underlying Values of Public and Private Law" in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000) and Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths, London, 1999).

<sup>100</sup> Notable examples of partial harmonisation of public and private law might include process contracts in tendering cases (*Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433), natural justice principles applicable in the employment context (B Boon "Procedural Fairness and the Unjustified Dismissal Decision" (1992) 17 New Zealand Journal of Industrial Relations), estoppel principles in public law cases (*Reprotech* and *Challis*), and improper purpose (JJ Spigelman, "The Equitable Origins of the Improper Purpose Ground" in L Pearson, C Harlow and M Taggart (eds), *Administrative law in a Changing State* (Hart Publishing, Oxford, 2008)).

<sup>101</sup> See above n \_\_\_\_.

<sup>102</sup> Craig, \_\_\_\_.

<sup>103</sup> See *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.

<sup>104</sup> See for example Catriona MacLennan, "Reviewing the review" NZ Lawyer (Issue 100, 31 October 2008).

the prerogative writs might now be capable of being abolished in favour of a singular statutory expression of judicial review similar to the JAA72.<sup>105</sup>

Further, there is a Bill of Rights dimension to the jurisdiction-conferring approach. Access to judicial review is enshrined in s 27(2) of the NZ Bill of Rights Act. As the jurisdiction-conferring approach admits some modifying impact – a statutory restriction which restricts, rather than enlarges – the supervisory jurisdiction might fall foul of this protection. In the present situation, where there is an interpretative question about whether there is modification or not, the Bill of Rights would seem to militate towards the procedural approach.

#### **IV Conclusion**

In this paper I have addressed the question of the proper relationship between review under the JAA72 and common law review. Does the JAA72 confer jurisdiction on the courts to engage in review of the actions of public bodies exercising statutory power and those private bodies also falling within its wide definition? Or must a body also be amenable to review under the applicable principles of the common law? I have argued that the JAA72 does not, and cannot, displace the need for common law principles. The text and purpose of the JAA72, along with the perverse implications of the jurisdiction-conferring approach, all support the JAA72 only being procedural in nature.

For the purpose of contrasting with the jurisdiction-conferring approach, the singular criterion I have used as code for the evaluation of jurisdiction at common law is "publicness".<sup>106</sup> It is this essential characteristic that the formalistic jurisdiction-conferring approach eschews as irrelevant to the initial amenability question. The criteria of "publicness" is an over-simplification of a wealth of case-law and scholarship. It is not my intention here to engage in an analysis or critique of how the concept of "publicness" has been given life by the courts.<sup>107</sup> However, the common law approach is not free from problems.

The concept of publicness is a situational value judgement. As Cane observes:<sup>108</sup> "[F]unctions do not come labelled as 'public' or 'private'. Nor is publicness like redness – a characteristic that can simply be observed." The delineation of government functions depends, ultimately, on one's theory of the state.<sup>109</sup> The model of the state varies, over time and across nations, as different political ideologies has achieved ascendancy.<sup>110</sup> The judicial assessment of whether some has, or should have, a public aspect draws the judges in the political domain – the resolution of this question is not neutral and apolitical. It is also perhaps a task that our judges,

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<sup>105</sup> Law Commission, *Review of Prerogative Writs* (IP 9, Law Commission, Wellington, August 2008).

<sup>106</sup> I prefer the language of "publicness" over other language. It is relatively faithful to the approach adopted in the seminal case of *Datafin*. It acknowledges reviewable publicness might be found in different ways, either through institution, function, consequences or impact. It aligns the *subject* and the *scrutiny*, because ultimately the question is about whether public law principles ought to apply.

<sup>107</sup> See Butler, "Is This a Public Law Case?" (2000) 31 VUWLR 747, etc.

<sup>108</sup> Peter Cane, *Administrative Law* (4 ed, Oxford University Press, Oxford, 2004) 17.

<sup>109</sup> Harlow and Rawlings, at 2.

<sup>110</sup> Harlow and Rawlings, at 9-25; Cane, *Administrative Law*, at 17. For historiographies of the New Zealand oscillations, 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.

trained in the common law tradition, are ill-equipped to grapple with.<sup>111</sup> This is true even if the enquiry is reframed as a more pure normative question: is the decision one which should be subject to public law principles?<sup>112</sup> Publicness and its alternative expressions risk, however, operating as floating signifiers, capable of being imbued with whatever content is deemed relevant. The promotion of lists of criteria has not necessarily improved the curial task.<sup>113</sup> As Professor Taggart said, the "case law has been far from consistent" when applying the public function and public consequences test.<sup>114</sup> As with any contextual assessment, "factor balancing" brings some uncertainty of outcome.<sup>115</sup>

But this rich – if perhaps still formative – tapestry of considerations demanded by the common law is preferable to the formalistic approach based on the JAA72 alone, an approach which ignores the conceptual underpinnings of public law's most powerful supervisory jurisdiction of judicial review.

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<sup>111</sup> McLean, "Public Function Tests: Bringing Back the State?", at 200.

<sup>112</sup> Cane, *Administrative Law*, at 7 and 18.

<sup>113</sup> See for example the indicia adopted in *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 at [69]..

<sup>114</sup> Taggart, "Administrative Law", at 92.

<sup>115</sup> *Ibid.*

## *Schedule: Judicature Amendment Act 1972 (extracts)*

### **3 Interpretation**

In this Part of this Act, unless the context otherwise requires,—

**Application for review** means an application under subsection (1) of section 4 of this Act

**Decision** includes a determination or order

**Licence** includes any permit, warrant, authorisation, registration, certificate, approval, or similar form of authority required by law

**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

**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

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

**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.

### **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.