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SPORTS ASSOCIATIONS AND THE ADMINISTRATION OF SPORT: DOES JUDICIAL REVIEW HAVE A PLACE?

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ABSTRACT

In recent years a number of disaffected persons have challenged in the Courts decisions made by sports associations. Traditionally the basis of challenge has been on the grounds of breach of contract. Latterly the preferred basis of challenge has been by way of judicial review. This paper examines the way in which judicial review has been used to impugn decisions made by sports associations. The exact scope of judicial review within this area remains unclear. This paper compares and contrasts the relevant law in New Zealand, England and other common law jurisdictions. In New Zealand the Courts seem to be taking a wider approach than other jurisdictions. However the amenability of decisions made by sports administrators to judicial review has yet to be fully tested in the Court of Appeal. This paper argues that a clear articulation of the law is required. Drawing on the cases this paper contends that judicial review will be available as an instrument to supervise decisions made by sports associations where the decision involves a sufficient public element. It is argued that the public importance of sport will in itself be a factor in determining whether there is a sufficient public element. The paper argues that the commercialisation of sport and sports associations will result in an even greater need for the supervision by the Courts of decisions made in the sporting arena. Lastly the paper asks whether there is a need for legislative reform in order to bring the decisions of sports associations under the supervision of the Courts. The paper examines the arguments for and against the interference of Courts in decisions made by sports associations and argues that judicial review should be available as an instrument of supervision. The paper concludes that legislative reform is not necessary as the common law is sufficiently elastic to meet the challenge.

WORD LENGTH

The text of this paper (including contents page, footnotes and bibliography) comprises approximately 16,500 words.

I. INTRODUCTION

Sport contributes a great deal to the lifestyle which New Zealanders enjoy. In addition the sports industry contributes in a significant way to the national economy by providing employment and generating revenue. The importance of sport to both society and the economy requires that it have effective, efficient and fair mechanisms for controlling its administration. This paper examines the way in which judicial review has been used to supervise the administration of sport in New Zealand. A comparison is made with other jurisdictions. A clear articulation of the law is called for.

Before examining the intervention of judicial review in the decisions of sports associations it is first necessary to clarify what is meant by both sport and sports association. No definition is attempted and much of the discussion will be relevant to other voluntary associations. However as it is argued that the element of sport will be a factor indicating that a particular decision made by an ostensibly private body has a sufficient public element, the essential elements of sport are outlined. Such an undertaking will assist in determining whether a particular sphere of activity may be regarded as a sport. In addition this paper focuses on administrative action of voluntary associations rather than administration of sport by individuals or government therefore a definition of an association is attempted. As this paper is concerned with judicial review it will also be necessary to clarify what is meant by judicial review. This is carried out in Part II of the paper.

Traditionally sports associations have been regarded as domestic or private bodies which fall outside the sphere of government.[1] The amenability of administrative action of sports associations to judicial review remains uncertain in New Zealand. At first sight it would appear that judicial review is available without qualification in order to impugn decisions of sports associations which are incorporated. This would in part appear to be a misapplication of Section 4 of the Judicature Amendment Act 1972. This approach may not stand up to the scrutiny of the Court of Appeal.

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[1] Sir William Wade *Administrative Law* (7ed Clarendon Press, Oxford, 1994) 660.

Although there are other grounds for intervention which enable Courts to impugn decisions of sports associations the preferred option by plaintiffs in New Zealand has been to apply under the ground of judicial review. These issues are canvassed in Part III.

The approach of the New Zealand courts is compared and contrasted with the approach in the English Courts. Reference is also made to other common law jurisdictions. Outside New Zealand the general consensus is that sports associations are private bodies which should not have their decisions impugned by an instrument of law used for controlling abuses and excesses of Government. However this view is by no means unqualified and the door remains open in each jurisdiction examined. This lack of unanimity illustrates the conflict between the desirability that private associations free from interference by the Courts and the recognition of the immense power which some voluntary bodies including sports associations wield in society. Part IV examines the case law and attempts to provide some indication of the types of sports association and types of decision which may be amenable to judicial review.

Commercial interests and professionalism are playing an increasing role and are having an increasing effect on the administration of sports associations.[2] Typically major sports now operate on two levels. At the higher level, sport is a form of public commercial entertainment. At the lower level, that is the club or grassroots level, it operates to provide a range of civic amenities including personal enjoyment, health and education to the participants.[3] Part V of this paper argues that in order to protect sports persons and subordinate sports associations in the increasingly commercial world of sport it will be more necessary than ever for participants to have recourse to judicial review.

In Part IV the paper asks whether legislative reform is necessary in order to control arbitrary power wielded by sports associations. The paper examines the arguments

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[2] P W David "Sport and the Law - a New Field for Players?" [1992] NZ Recent Law Review 80.

[3] Edward Grayson *Sport and the Law* (7ed Butterworths & Co Publishers Ltd, London 1994) viii, xlix.

for and against the intervention of judicial review in the decisions of sports associations and concludes that on balance the availability of judicial review to affected participants is desirable in order to provide effective and fair mechanisms of control. The paper concludes that legislative reform is not required but that a wide view should be taken by the Courts in relation to the scope of judicial review. It calls for an approach which recognises that public power can reside in bodies other than government organisations and concludes that any regulatory power with a sufficient public element should in principle be reviewable.[4]

II. SPORTS ASSOCIATIONS AND JUDICIAL REVIEW

A. *What is a Sports Association?*

1. *The character of sport*

There is no doubt that sport plays an important and perhaps essential role in New Zealand Society. In 1990 47% of all New Zealanders belonged to at least one sport, fitness or leisure club and 30% of all New Zealanders regularly spent their leisure time in voluntary support roles for sport, fitness and leisure activities. In 1992 sport and leisure generated $4.5 million a day in business and supported over 22,000 jobs.[5] As John Hargreaves, author of a sociological study on sports, points out societies would be unquestionably different places in the absence of organised sport.[6]

Edward Grayson, a sports law commentator, has concluded that sport defies definition.[7] Much of the argument in this paper will equally apply to other voluntary associations involving other spheres of activity such as religion, education, artistic and

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[4] Julia Black "Constitutionalising Self Regulation?" [1996] 59 MLR 24.

[5] *New Zealand Official Year Book 95* (98ed, Statistics New Zealand, 1995) 301.

[6] John Hargreaves *Sport, Power and Culture* (Polity Press, Cambridge, 1986) 14.

[7] Above n 3.

cultural activities. As this paper argues that the very nature of sport will itself be a contributing factor in deciding whether a particular decision is amenable to judicial review, the characteristics of sport must be identified if not defined. The fact that a particular decision of a voluntary association does not involve sport will not of course disqualify it from the purview of judicial review. Each case will depend upon its particular circumstances but the fact that the decision involves sport will be one factor pointing towards its public nature.

Recently Parliament was required to formulate a definition of sport in order to institute sports betting legislation. Section 99I of the Racing Amendment Act 1995 provides that "'sport' means any lawful organised game, competition, or event involving human competitors conducted pursuant to rules which are under the control of a national or international sports organisation". The above definition illustrates the difficulty in defining sport. The definition is at once too wide and too narrow. The definition leaves out the crucial physical element of sport and applies only to those sports under the control of a national sports organisation. In addition the definition excludes greyhound racing which does not involve human competitors but is controlled by the Racing Act, albeit in a different part of the Act.

Instead of adopting a definition of sport the writer intends to adopt the characteristics identified by Hargreaves which in his view are common to all sports.[8] All sports embody an element of play, they are highly formalised and in many cases are governed by elaborate codes or statutes, they involve some element of contest between participants, they constitute a form of popular theatre, they involve ritual practices characterised by rule governed behaviour of a symbolic character and lastly, they require a physical input. The primary focus of sports is on the body and its attributes. It is noted that such a definition leaves out those forms of physical activity where there is a struggle with one self such as mountain climbing, hunting or fishing. These activities have the crucial physical element but lack the rules and structure of competition which equalise conditions for participants and require fair play. The

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[8] Above n 6, 10-12.

abovementioned characteristics are present to varying degrees in all the major organised sports in New Zealand. It is these elements which distinguish sports from other spheres of activity and give it a special character.

2. *What is an association?*

There are over fifty national associations which are members of the New Zealand Assembly for Sport. Those associations claim a collective membership of over 1.5 million.[9] There are a number of bodies which are involved with the administration of sport. Such bodies include government departments, local authorities, schools, clubs, incorporated and unincorporated associations and companies limited by shares. This paper is concerned with voluntary, self-regulating associations. Therefore government departments, local authorities and schools will fall outside the purview of this paper. So also would statutory bodies established to administer or foster sports. For instance the Hillary Commission which was established under the Sport, Fitness and Leisure Act 1987 with a purpose of improving the quality of life of New Zealanders by enabling them, inter alia, to participate and achieve in sport would not qualify as a sports association. On the other hand the New Zealand Racing Conference which is an unincorporated body made up of racing club members and the New Zealand Rugby Football Union which is an incorporated body made up of provincial rugby union members would qualify as a sports association.

The definition proposed by Black for self-regulatory associations is useful.[10] She describes an association as a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority. The writer would add to this definition that acceptance may not be given freely and there may be others outside the collective who are affected by the regulations made by the association. As the Master of the Rolls Lord Donaldson pointed out in *R v Takeover Panel, ex p Datafin Plc,* self-regulation "Can connote a system whereby a

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[9] Above n 5, 301.

[10] Above n 4, 27.

group of people acting, in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising."[11]

The touchstone is voluntary collective self-regulation. Such a guide will exclude government regulation and individual self-regulation. Of course the government may be indirectly involved in the regulation of any particular association. A sports association will be any such body which regulates or administers sport. For the purposes of this paper it will include bodies such a tribunals and committees formed under the rules of the associations.

Less typically sports associations may be unincorporated societies or limited liability companies. An example of the former is the Auckland Warriors Limited and the latter would be the New Zealand Racing Conference. In each case the association will formulate rules and regulations for governing itself, imposing conditions of membership and discipline and for controlling the administration of the particular sport. Such control may also include formulating the rules under which the sport itself is to be played.

B. Judicial Review

The law has intervened in the decisions of governing bodies of sports in a number of ways. For instance by way of an action in defamation, unreasonable restraint of trade or unreasonable interference with a person's right to work, and by way of breach of express and implied terms in a contract between the parties.[12] This paper is concerned with judicial intervention by way of the prerogative writs and under Section 4 of the Judicature Amendment Act 1972. Namely those principles of administrative law which are designed to provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the

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[11] [1987] 1 QB 815, 826.

[12] Above n 3, 279-309.

disadvantage of the public.[13] Lord Templeman has said: "Judicial review involves interference by the Court with a decision made by a person or body empowered by Parliament or the *governing law* to reach that decision in the public interest" (emphasis added).[14] The principles upon which the Court is permitted to intervene in a decision under the principles of judicial review are set forth in the classic dictum of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*.[15]

The general grounds for challenge are under illegality, procedural impropriety or unfairness, and irrationality or unreasonableness.[16] Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made.[17] By illegality is meant that a decision maker must not fall into legal error and act outside the scope of his or her powers. The potential will arise for a sports administrator to fall into legal error when exercising powers under the association's rules or constitution. In addition the decision maker must not exercise his or her decision for an improper purpose outside the scope of the governing law. A decision maker must take into account certain relevant matters and must not take into account certain irrelevant matters.[18] The decision maker must not rigidly apply a pre-determined policy without regard to the particular merits of the case[19] or invalidly delegate a power to another person.[20] The above list is not exhaustive but illustrates that sports administrators acting under the powers of a sports association's rules or constitution

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[13] de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5ed, Sweet & Maxwell, London, 1995), 3.

[14] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 388.

[15] [1984] 3 All ER 935, 950, 951.

[16] Above n 15, see also *Webster v Auckland Harbour Board* [1987] 2 NZLR 129.

[17] *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, 155.

[18] *Fiordland Venison Ltd v Minister of Agriculture* [1978] 2 NZLR 341.

[19] *British Oxygen Ltd v Board of Trade* [1971] AC 610.

[20] *Hawkes Bay Raw Milk Producers' Co-operative v New Zealand Milk Board* [1961] NZLR 218.

must take care to understand correctly the law that regulates his or her decision making power. Such decisions will include those made in the course of disciplinary proceedings.

The terms unreasonableness and irrationality are broader concepts and focus on the decision or the outcome itself rather than the process by which the decision was reached. They apply to a decision that no reasonable decision maker could have made in the circumstances.[21] This ground of review comes the closest to considering the merits of a decision. Often where a Court finds that a decision maker has acted unreasonably there will be one or more breaches of one of the other grounds for review.[22] Given the nature of the ground it is most likely to be used by persons affected under disciplinary proceedings but may also apply to unreasonable rules.

The last general ground for review is procedural impropriety or unfairness. This ground covers the requirements of natural justice and includes the concept of legitimate expectation. There are two basic requirements of natural justice or fairness, namely the duty to inform a person sufficiently and to allow them an opportunity to be heard and the rule against bias.[23] Once again an application for review on the grounds of a breach of natural justice are most likely to arise in relation to decisions made by sports associations where disciplinary proceedings are involved. However the principles may well arise where for instance a national body makes an administrative decision concerning a member club or members generally.

In addition the concept of legitimate expectation and duties of consultation arising out of that expectation also form part of the ground of procedural impropriety or fairness. A legitimate expectation will most likely arise where the decision maker has given

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[21] *Chiu v Minister of Immigration* [1994] 2 NZLR 541.

[22] For example see above n 21, 550.

[23] *Ridge v Baldwin* [1964] AC 40, 75, *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142.

some assurance to the affected person that they will be treated in a certain way[24] or it may arise from a practise in the administration of the governing law.[25] The legitimate expectation involves a right to be heard and consulted. It would typically arise where a member club or a member generally expects to be treated in a particular way. It is likely to arise in a licensing type situation where the affected individual may be excluded or denied participation in the particular sport.

As Beloff has pointed out the general grounds for review set out in *Council of Civil Service Unions* was never intended to be exhaustive.[26] There is authority for the proposition that a decision based on a mistake of fact may be grounds for review.[27] The availability of mistake of fact as a ground for review will have a significant impact on the disciplinary decisions of sports associations where, for instance, administrative findings of fact are made in relation to foul play and other live action during a sporting event.

Another possible ground for review is based on the European principle of proportionality. The doctrine of proportionality is directed towards maintaining a proper balance between any adverse effects which an administrative body's decision may have on the rights, liberties, or interests of persons and the purpose which the decision pursues. Alternatively the reviewing authority adopts the course that where the particular objective can be achieved by more than one available means, the least harmful means should be adopted.[28] The principle of proportionality has yet to be accepted by the commonwealth jurisdictions but may well shade into the principle of

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[24] *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2AC 629.

[25] *AMP Society v Waitemata Harbour Maritime Planning Authority* [1982] 2 NZLR 448.

[26] Michael J Beloff "Judicial Review - 2001: A Prophetic Odyssey" [1995] 58 MLR 143, 150.

[27] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 146, 147, Cooke J said in obiter that mistake of fact was a valid ground of review. In *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 the Court of Appeal accepted that mistake of fact was a ground for judicial review.

[28] *R v Intervention Board for Agricultural Produce, ex p ED & F Mann Neta-Muhle Josef Bergmen v Grosw-Farm Case* 114/76 [1977] ECR 1211.

unreasonableness.[29] This principle if adopted would have significant consequences to decisions made by sports associations where sanctions or other orders are imposed, such as fines, suspensions and disqualifications.

The principles of judicial review outlined above are not mutually exclusive. Lord Donaldson MR has said:

> The reality is that judicial review is a jurisdiction which has been developed and is still being developed by the Judges. It has many strands and more will be added, but they are and will always be closely interwoven. But however the cloth emerges from the loom, it must never be forgotten that it is a *supervisory* and not an *appellate* jurisdiction.[30]

As can be seen above the availability of judicial review as a tool to impugn decisions made by sports associations will have far reaching consequences to the way they make their decisions. It should however be borne in mind that although a decision maker may come within the ambit of judicial review the remedies are discretionary and the Court can not impose its view of the merits of a decision upon the decision maker.

III. THE PRESENT STATE OF THE PLAY

A. Public Policy Requirements of Natural Justice and Fairness

1. Implied terms in the rules of the association

Typically decisions of sports associations will involve disputes between sports bodies and their members including disciplinary decisions, constitutional decisions involving

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[29] See *Isaac v Minister of Consumer Affairs* [1990] 2NZLR 606, 636 where Tipping J said that the principal of proportionality was a criteria upon which the Court could consider whether a decision was unreasonable, see also *R v Secretary of State for the Home Department: ex p Brind* [1991] 1 AC 696, where the House of Lords considered that the principle could be of relevance in establishing unreasonableness. The House was divided as to whether it was a separate ground for review.

[30] Above n 29 reference to *Brind*.

administrative action under the rules and bylaws of the association and membership or registration matters. The law will intervene where there is a contract between the decision-maker and the person seeking to challenge the decision. A member will have enforceable rights in contract brought about by his or her membership of a voluntary association, including the right that the association's affairs will be conducted in accordance with the association's rules.[31]

The Courts will also intervene by implying into the rules of voluntary associations the rules of natural justice. For example in *Breen v Amalgamated Engineering Union*[32] the plaintiff sought inter alia declarations that a decision of a trade union's district committee not to approve him for election was made in disregard of the rules of natural justice and was void. The Court of Appeal implied in to the contract of membership between the parties a duty to act fairly on grounds of public policy. That duty to act fairly involved informing the member of the charge and giving the member an opportunity to be heard.

Lord Denning MR recognised that some domestic bodies were set up by powerful associations which could control a person's livelihood by expelling them as a member or refusing them membership or the grant of a licence. He likened rules of such associations to a legislative code. He conceded that the Courts could not grant the prerogative writs such as certiorari and mandamus against domestic bodies but concluded they could grant declarations and injunctions which he stated were the modern machinery for enforcing administrative law.[33]

Similarly in *Enderby Town Football Club Ltd v Football Association Ltd*[34] the question arose as to whether a rule of the Football Association which excluded legal

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[31] *Turner v Pickering* [1976] 1 NZLR 129, 141, see generally *Bouzaid v Horowhenua Indoor Bowls Centre* [1964] NZLR 197,193.

[32] [1971] 2 QB 175.

[33] Above n 32, 190.

[34] [1971] 1 Ch 591.

representation at an appeal hearing was valid. Although the Court of Appeal found that the rule was valid provided it left open the possibility of legal representation in an exceptional case, the Court of Appeal agreed it could hold a rule of the Football Association to be invalid on the grounds that it was contrary to public policy even though it was contained in a contract.[35]

The principles laid down by the Court of Appeal in *Enderby* and *Breen* will be limited to situations where the affected person is a member of the relevant sports association. Also the grounds for intervention under implied contractual terms may be narrower than the grounds for intervention under judicial review. Intervention has traditionally been on the grounds of illegality and procedural impropriety. Members in a contractual relationship with the association will have protection where it and bodies constituted under its rules act outside the scope of their powers or act unfairly. In addition Fisher J commented in *Waitakere City Council v Waitemata Electricity Shareholders Society Inc*[36] that it might be possible for a member of an association to challenge an amendment to the association's rules on the basis of a breach of an implied term similar to a duty to act reasonably. In addition, as well as remedies of injunction and declaration the wronged party will also have a claim in damages. It is however unlikely that the grounds for intervention under contract will be as wide as those for judicial review.

2. *Where no contractual relationship exists*

Where there is no contractual relationship between the affected person and the sports association in question there is another ground for intervention besides judicial review. In *Nagle v Feilden*[37] the plaintiff was a woman who had trained race horses

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[35] Above n 34, 606. See also *Hollioake v West Australian Cricket Association* [1994] 11 LAR 423, principles of natural justice held to apply to a committee of inquiry, *Bryne v Auckland Irish Society Inc* [1979] 1 NZLR 351, principles of natural justice held to apply to rules of society.

[36] Unreported, 18 March 1996, High Court, Auckland Registry, M1544/95, 14, 15.

[37] [1966] 2QB 633.

for many years. She applied to the Jockey Club for a trainers licence but was refused. It was the practice of the stewards of the Jockey Club to refuse to grant a trainers licence to a woman. The plaintiff brought an action against the Jockey Club claiming, inter alia, a declaration that the practice of the stewards in refusing a trainers licence to any woman was void as against public policy and for an injunction ordering the stewards to grant her a licence. The trial judge struck out the claim on the basis that it disclosed no cause of action as there was no contractual relationship between the parties.

Lord Denning MR delivered the leading judgment of the Court. He conceded that a person who was refused membership of a social club would have no cause of action. However he held that the Jockey Club was an association which exercised a virtual monopoly on an important field of human activity. His Lordship noted that the club's refusal to grant a licence could put a person out of business. The refusal concerned a person's right to work which could be likened to a property right. He held that where an association rejects a person arbitrarily or capriciously then there would be jurisdiction to grant a declaration and injunction in order to protect those rights.

Nagle has been followed by the New Zealand Court of Appeal in *Stininato v Auckland Boxing Association Inc*[38] where the Boxing Association refused the applicant's application for a licence to box on the grounds of alleged past misconduct. No opportunity was given to the applicant to answer the charges. The Court of Appeal held that the refusal by the Boxing Association to grant the applicant a professional boxers licence but without giving him an opportunity of answering the charge could be capable of being regarded as an unreasonable restraint of trade and as a breach of natural justice. The Court of Appeal held the doctrine could apply to an act or a constituent body as well as to a rule of the association.[39]

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[38] [1978] 1 NZLR 1.

[39] Above n 38, 8.

Cooke J said that the principle which extends the jurisdiction of the Courts over vocational associations is not dependent on technicalities of contract or property. He concluded that the need to mould public policy to protect the right to work and the traditional concern of the common law to ensure that a man is not condemned without an opportunity of being heard would provide strong reasons for holding that a Court has a power to review decisions of a sports association. He concluded remedies of declaration and injunction would be available to declare past decisions of sports associations invalid and compel proper consideration of pending applications where the person's right to work is affected.[40] Richmond P and Woodhouse J expressed similar sentiments. The Court applied the reasoning in *Breen* and *Nagle* in reaching their conclusion and noted that the boxing association had monopolistic powers which virtually excluded the professional boxers' right to work.

Pannick has commented that unreasonable restraint of trade in this context appears to be treated as a tort by the Courts.[41] However in *Stininato* it seems clear that the Court of Appeal saw the doctrine as being founded in administrative law.[42] As such it would appear to be an ad hoc public law remedy and the judgment indicates that the remedy goes beyond the interference of the right to work to a general public policy that voluntary associations must act fairly.[43]

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[40] See also *Blackler v New Zealand Rugby Football League Inc* [1968] NZLR 547, where the Court of Appeal held that the rule under which the League acted to deny the plaintiff clearance was an unreasonable restraint of trade and therefore void as between the plaintiff and the League even though there was no contractual relationship between the parties.

[41] David Pannick "What is a public authority for the purposes of Judicial Review?" in J L Jowell and D Oliver (Eds) *New Directions in Judicial Review* (Stevens & Sons, London, 1988) 23, 30.

[42] Above n 38, 29.

[43] For an example of how judicial review and the principle of unreasonable interference with the right to work can operate in identical circumstances see *Power v New Zealand Football Association Inc*, unreported, 16 March 1987, High Court, Auckland Registry, CP283/87 and *Stevenage Borough Football Club Ltd v The Football league Ltd* Times Law Reports, 1 August 1996.

B. *Judicial Review Under the Judicature Amendment Act 1972 and the Prerogative Writs*

No examination of the way judicial review has been used as an instrument to question the decisions of sports associations can be separated from a critical analysis of the scope of judicial review. The two matters are inextricably interwoven. The scope of judicial review in the sphere of sports provides the main topic for debate in the common law jurisdictions outside New Zealand. The ready availability of judicial review as a tool for impugning decisions made by sports administrators is unique to New Zealand. In the racing industry members challenge by way of judicial review decisions of the New Zealand Racing Conference and New Zealand Trotting Conference and their constituent clubs and committees on a fairly regular basis. The amenability of administrative action to judicial review amongst the racing clubs can to some extent be explained by the level of government intervention under the Racing Act 1971. More controversial is a willingness of the High Court to examine decisions of sports associations by way of judicial review where there is no apparent government intervention.

The grounds upon which judicial review will be available have been discussed above.[44] Whether a particular body is in fact amenable to judicial review is another question. The point is illustrated in the decision of *Simpson v NZ Racing Conference*,[45] where the plaintiff horse trainer faced two charges under the rules of racing after the horse he had trained returned a positive test for a prohibited drug. The first disciplinary body, the district committee, imposed a fine. On an appeal brought on behalf of the executive committee of the New Zealand Racing Conference the Appeal Judges found that the fine imposed was an inadequate penalty and substituted a term of disqualification for twelve months. The plaintiff brought an action by way of judicial review under the Judicature Amendment Act 1972 against the decision of the Appeal Judges on grounds of procedural impropriety and illegality.

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[44] Above, Part II.

[45] Unreported, 24 June 1980, High Court, Wellington Registry, A531/79.

Although the plaintiff ultimately failed, the Court finding that the appeal judges were clearly acting within their jurisdiction and that there was no miscarriage of justice or unfairness in their decision, an important procedural point was raised by the defendants. They contended that the nature of the decision did not fall within the jurisdiction of the Act on the grounds that the District Committee and the appeal judges had not executed a statutory power under Section 4 of the Act. Section 4(1) provides:

On an application ... for review, the [High Court] may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, 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 (emphasis added).

Section 3 of the Act provides:
"statutory power" means a power ... to exercise a statutory power of decision ...

Section 3 defines:
"statutory power of decision" as 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;
(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 point arose in *Simpson* because the New Zealand Racing Conference was an unincorporated society. Jeffries J, citing an earlier Royal Commission set up to investigate and report on horse racing in New Zealand, noted that the Racing Conference was in constitution an association of racing clubs. It was a not a statutory

body and had no statutory authority or powers. It derived its authority solely from the rules of racing which operated through their contractual force, namely that all those who participated in racing agreed to be bound by the rules.[46]

As the New Zealand Racing Conference was an unincorporated society the Appeal Judge's decision did not come within that part of the definition of a statutory power or statutory power of decision which specifically refers to a power or a right under the rules of "any body corporate". Jeffries J examined the Racing Act 1971 and held that by adopting the existing rules of the racing and trotting conferences and the Greyhound Association and in affirming but restricting their powers to make rules, the legislature had imposed a material measure of control over the rule making powers of those bodies to such an extent that no longer were their rule making powers unaffected by the Act. He concluded that the rule making power of a New Zealand Racing Conference was made pursuant to a power or right conferred by "any act" namely the Racing Act 1971, and therefore came within the definition of a statutory power.

In *Simpson* that the Court was concerned to bring the decision exercised by the appeal judges under the definition of "statutory power" and "statutory power of decision". The Court was not conducting an enquiry into whether the decision of the Appeal Judges was in general terms one capable of review at common law.[47]

If Section 4 is read according to its plain and ordinary meaning, a prospective litigant must not only show that the decision maker has exercised a statutory or corporate power but must also show that he or she would be entitled to relief under one of the prerogative writs or by way of declaration or injunction. The Court may then by order grant that specific relief to which the litigant is entitled. If this interpretation is correct then the substantive grounds for judicial review are unaltered by the Act.

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[46] Above n 45, 7.

[47] The common law prerogative writs and equitable remedies of injunction and declaration have been retained in the High Court Rules. Procedurally they remain important as an alternative mechanism for review.

Claimants may use the procedure in order to obtain a remedy in the nature of mandamus, prohibition or certiorari if they would be entitled to that remedy at common law. In addition claimants may use the procedure in order to obtain a remedy by way of declaration or injunction. For instance, if they had such a right under contract or under the principle of unreasonable interference with the right to work. However, incorporation alone would not entitle the prospective litigant to a remedy. The types of decision for which a claimant might claim relief under the Judicature Amendment Act 1972 would be restricted to the same grounds for review which are available at common law.

The above view is supported by the decision of the full court of the High Court in *Re Royal Commission on Thomas Case* which stated that the intention of the Judicature Amendment Act 1972 (as amended) was not to widen the grounds on which the Court could grant relief, but to extend the nature of relief that could be granted once those grounds were established, and to improve the procedure by which that relief could be obtained.[48] Taylor appears to have taken the view that incorporated societies may be reviewed under the Judicature Amendment Act 1972 without more.[49] This view appears to find support amongst the profession and the High Court.[50] It is, with respect, doubtful that this view will stand up to critical scrutiny. As yet there has been no clear articulation on the exact scope of Section 4 of the Act or for that matter of the amenability of decisions made by sports administrators to judicial review.

There is indirect support for the view that Section 4 of the Judicature Amendment Act 1972 has procedural and not substantive effect in the Court of Appeal decision *Finnigan v NZRFU (No. 1)*.[51] In that case, club members who were not in a contractual relationship with the NZRFU sought a declaration that a purported

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[48] [1980] 1 NZLR 602,615, 616.

[49] D G S Taylor *Judicial Review* (Butterworths Wellington) 1991) 6.

[50] See below, Part III C, 2.

[51] [1985] 2 NZLR 159.

decision of the Union to accept an invitation for the national team to tour South Africa was invalid on the grounds that it was against the objects of the Union's constitution and an injunction to restrain the Union from implementing the decision. The Court of Appeal dealt with the issue as one of standing and therefore side-stepped the issue of scope. The Court made it clear that it was not holding or even discussing whether the decision of the NZRFU was the exercise of a statutory power.[52] The NZRFU was an incorporated society. Section 7 of the Judicature Amendment Act 1972 provides that the Court may treat proceedings for a declaration or injunction which relate to a statutory power as if they were an application for review under the Act. If incorporation itself had been sufficient to attract the traditional remedies under the prerogative writs then there was no reason why the Court of Appeal could not have dealt with the case in this way.

It is also worthy of note that in *Waitakere City Council* Fisher J rejected the submission that the Waitemata Electricity Shareholders Society which was an incorporated society would be subject to non-contractual public law grounds. He said:

> It is undoubtedly the case that in limited circumstances some non-contractual public law grounds can be invoked against a voluntary or commercial organisation, for example where the organisation is publicly owned and its decisions in the public interest could adversely affect the rights and liabilities of private individuals without other form of redress... where it exercises quasi-public functions ... and (perhaps) where its decision could have significant direct impact upon the public... The list could never be closed but I do not think that this case falls into one of those three specific instances.[53]

It is therefore unlikely that incorporation of itself will be sufficient to attract the remedies under the Judicature Amendment Act 1972. The exact scope of judicial review at common law is discussed in detail in Part IV of the paper. In New Zealand a number of cases have come before the Courts where the claimant has sought judicial

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[52] Above n 51, 179.

[53] Above n 36, 14, His Honour cited as authority *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, *R v Panel on Takeovers & Mergers, ex p Datafin* [1987] 1 QB 815 and *Finnigan v NZRFU No. 1* [1985] 2 NZLR 181.

review of decisions made by sporting bodies and their constituent committees or tribunals. What is of note is that affected persons in the sporting arena have chosen in the main to challenge decisions on the grounds of judicial review rather than on grounds of breach of contract or unreasonable interference with a right to work. A singular feature of these cases is that the jurisdiction of the Court to hear the matter and apply the traditional grounds of judicial review have rarely been challenged. It appears that both plaintiffs and defendants accept the view that incorporation is of itself sufficient to attract the remedies of the prerogative writs. This may also indicate that the action by way of judicial review is more convenient and suitable to the types of administrative decision being made by sports associations and accepted by plaintiffs and defendants alike. The advantages of judicial review is that it is speedy, remedies are supervisory and relief is discretionary.

C. *An Examination of the New Zealand Cases*

1. *The racing cases*

Since the decision in *Simpson*, members of the racing industry have regularly applied to the Court for judicial review of decisions made by the racing and trotting conferences or the committees and tribunals constituted under their respective rules. Applicants typically include trainers, jockeys, owners and member clubs. The vast majority of applications, concern decisions made by disciplinary tribunals. The Court of Appeal has entertained applications for review of the powers and decisions of the various decision making bodies in the racing industry without comment as to jurisdiction.[54]

In the racing cases the Courts have been willing to intervene under all the traditional grounds for judicial review. The cases illustrate the number of ways in which decision making bodies constituted under the rules of the racing conferences and the racing clubs can affect participants in the sport of racing. For example in *Kerr v*

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[54] For example *New Zealand Trotting Conference v Ryan* [1990] 1 NZLR 143.

Frampton & Ors,[55] the decision of the judicial committee finding a trainer guilty of corrupt practices and disqualifying him for six months was quashed by Hansen J and was sent back to the committee for a proper determination in the terms of the judgment. His Honour had found that the initial charges were bad for duplicity and therefore in breach of the requirements of natural justice and that the committee had wrongly interpreted the relevant rules as it did not have jurisdiction to hear one of the charges. The case is typical of the grounds upon which decisions of the racing conference will normally be impugned and illustrates that decisions of disciplinary tribunals can have a major affect on a person's livelihood.

Owners whose livelihood is arguably not at stake have also sought judicial review of decisions made by racing clubs. In *Naden v Judicial Committee of the Auckland Racing Club*[56] the plaintiff owners were unsuccessful in obtaining orders directing that the Appeal Judges reconsider their decision not to review further evidence. It is worthy of note that although owners livelihoods may not strictly speaking be at stake, a disqualification or relegation of their horse might deprive them of substantial prize money.

The decision of *Johnson v The Appeal Judges appointed by the President of the New Zealand Racing Conference*[57] provides an example of the enormous affect a disciplinary tribunal of a sports association can have on the livelihood of participants. Johnson sought judicial review of the Appeal Judges' decision to overrule earlier decisions of two disciplinary tribunals lower in the hierarchy in which they substituted a finding of reckless riding for one of foul riding. The charge of foul riding carried a mandatory disqualification from riding for six months. He appealed on the grounds, inter alia that the appeal judges misdirected themselves as to the law in

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[55] Unreported, 13 May 1996, High Court, Christchurch Registry, CP190/95, see also *Gillespie v Cunningham*, Unreported, 16 August 1993, High Court, Christchurch Registry, CP374/90, where Tipping J observed that a person alleged to be bound by the rules was entitled to have the rules observed and it was the duty of the Court to ensure that public and domestic tribunals remain on their "jurisdictional rails".

[56] [1995] 1 NZLR 307.

[57] Unreported, 3 May 1996, High Court, Wellington Registry, CP100/96.

finding there was a lack of reasons given at an earlier hearing of the District Committee when in fact reasons were given and that they failed to give him an opportunity to be heard in respect of all relevant matters concerning penalty.

Gallen J pointed out at the beginning of his judgment that disciplinary decisions made within a sport are basically decisions for the administrators of that sport who are contemplated as being appropriate by the rules that govern the sport. His Honour commented that such administrators have the expertise which is appropriate for dealing with disputed questions of facts and they have the knowledge which allows them to come to conclusions where there is some dispute as to what may have occurred. However he also noted that disciplinary action of the kind under consideration fell within the category where the rules of natural justice apply. He pointed that the Courts would ensure that those rules were taken into account to ensure that the hearing was conducted in an appropriate and fair way.[58]

The Court rejected the plaintiff's claims that Appeal Judges had made an error in law but upheld his claim that there had been a breach of natural justice. No opportunity had been given to the plaintiff to make specific submissions as to penalty at the hearing. The decision on penalty was accordingly set aside and remitted to the Appeal Judges in order to give the plaintiff the opportunity to make such submissions.

Johnson appealed to the Court of Appeal on the basis that the appeal judges had substituted their own judgement on the facts without paying proper regard to the decision of the stewards at first instance and to the District Committee who had heard oral evidence from the jockeys involved.[59] The Appeal Judges relied on the transcripts of evidence below and the video films of the race. It was the plaintiff's contention that the appeal judges should have given weight to the findings of the lower tribunals who had the advantage of seeing and hearing the evidence first hand.

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[58] Above n 57, 6.

[59] *Johnson v The Appeal Judges Appointed by the President of the New Zealand Racing Conference*, Unreported, 16 July 1996, Court of Appeal, CA117/96.

Keith J delivered the judgment of the Court of Appeal and held that the appeal judges were entitled to rely on the video evidence in reaching their decision. The learned judge conceded that there was room for distortion in films but noted that they were assuming a greater importance in sporting disputes. He noted that the Appeal Judges were able to see the action recorded as it occurred and not as "filtered through the memories and words of witnesses and then recorded on the printed page."[60]

The Johnson decisions provide a number of useful insights into the role of judicial review as a tool for challenging the decisions of tribunals set up under sports associations. Firstly they illustrate the reluctance of the Court to interfere with a sports disciplinary tribunal's decision where factual issues are involved. This will be especially so where findings of fact require specialist knowledge. In addition the cases provide an indication of the increasing importance which video footage will have in decisions of sports disciplinary tribunals. Such evidence is typically unique to sports. As discussed above a fundamental characteristic of sports is the physical element. This action can readily be recorded on video and will provide a wealth of evidence which will not be available to disciplinary tribunals in other spheres. However there could be a danger in over-reliance on video evidence. Film is one-dimensional and will not show the depth which is required in order to obtain a true perception of events. An attempt to relegate eye witness accounts and evidence from the participants themselves to a secondary role should be resisted.[61]

On a different note, the Johnson cases also indicate that the Courts will readily intervene by way of judicial review in decisions of disciplinary bodies of sports associations where issues of natural justice and procedural fairness are involved. However the requirement to observe the rules of natural justice will not necessarily

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[60] Above n 59, 6.

[61] See *Naden v Judicial Committee of the Auckland Racing Club*, Unreported, 22 April 1994, High Court, Auckland Registry M1414/93 where the plaintiff sought judicial review of the appeal judges refusal to admit evidence of two jockeys which they claimed would have shown that the judicial committee's conclusions were based on an optical illusion. The point is also illustrated in the newspaper article "Here's elbow affair - you be the judge" *Sunday - Star Times*, New Zealand, 25 August 1996. A photograph shows Johnson leaning out of his saddle and impeding the jockey next to him. Unrecognised by the article writer is the double image of Johnson and his horse in the photograph resulting in a distinct lack of clarity.

result in decisions which may seem unduly harsh. When submissions were finally made as to penalty the Appeal Judges stood by the six month disqualification. Although Johnson finished the season as leading jockey he was in effect unable to earn his livelihood for a period of six months. This was despite the fact that he had completed over 760 rides for the season.

The Courts have also been willing to intervene by way of judicial review on the grounds of unreasonableness. In *New Zealand Trotting Conference v Ryan*, [62] the Court of Appeal considered whether a rule under the New Zealand Rules of Trotting were manifestly unreasonable. The rule in question provided for the named body or person constituted to hear the matter under the rules to be able to deem an act fraudulent or corrupt or detrimental to the interests of trotting. The Court of Appeal held that it was implicit that the named body or person must act rationally and reasonably in reaching its conclusion.[63]

The racing cases provide a number of illustrations of how judicial review might operate in the sphere of sports administration. The Courts have been willing to intervene on all the general grounds for judicial review. On a number of occasions the various bodies constituted under the conferences' rules have acted outside their jurisdiction or unfairly. The conferences exercise effective monopolies over their sphere of activity and their decisions have the potential to affect a number of participant's livelihoods, rights to prize-money and right to participate generally. Judicial review appears to provide much needed protection for participants without unduly penalising the administering associations

2. *Judicial review of other sports associations*

There have been a number of recent cases where the High Court has allowed litigants to question decisions of sports associations by way of judicial review outside the

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[62] [1990] 1 NZLR 143.

[63] Above n 62, 149.

racing industry. In each case discussed in this section, application for review was sought under Part I of the Judicature Amendment Act 1972. In the main both plaintiffs and defendants have accepted that the common law grounds for judicial review have been available once it has been established that the association in question is a body corporate. Decisions of associations have been impugned on grounds of illegality, procedural impropriety and unreasonableness.

An example of where a sports association has acted outside its powers occurred in *The Lower Hutt City Association Football & Sports Club Inc v New Zealand Football Association Inc.*[64] The applicant which was a club member of the New Zealand Football Association challenged by way of judicial review a decision of the Football Association which it purportedly made under its rules. The club had earlier successfully challenged the Football Association's decision to relegate its top team to the third division of the Central League through the internal mechanism of appeal under the NZFA rules. The Central League was not happy with the decision. The Football Association therefore referred both parties to arbitration. The Club argued that the Football Association's decision to refer the matter to arbitration was illegal.

Anderson J found as a matter of interpretation of the rules that the Football Association's decision to refer the matter to arbitration was indeed invalid and granted a declaration that the participation of the Club's team in the premier division of the Central League, found to be appropriate by the judicial committee and endorsed by the Council, should be upheld. Clearly the decision was the right one as the Football Association had attempted to rely on a technicality in order to avoid implementation of the judicial committee's decision.

Similarly in *Otahuhu Rovers Rugby League Club Inc & Ors v Auckland Rugby League Inc* three Auckland Rugby League clubs sought to question the validity of a decision of the Auckland Rugby League Inc which controlled the game of rugby league within

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[64] Unreported, 13 March 1993, High Court, Auckland Registry, M335/93.

the Auckland district.[65] The clubs questioned the legality of Auckland Rugby League's directive to them that they display Lion Red (New Zealand Breweries) insignia on their goal post bolsters and corner flags. The three clubs were sponsored by Dominion Breweries.

Williams J found that the ARL directive was reasonably necessary to implement the agreement it had made with Lion Breweries and to carry out the broad objectives as delineated in its constitution.[66] The clubs were bound by the constitution by reason of their affiliation to the ARL. Therefore the ARL had acted within its powers. Both *Lower Hutt City Association Football* and *Otahuhu Rovers Rugby League* illustrate the conflicts that can arise between a governing body and its member associations. It is clear the Courts will require that governing sports associations act within the powers conferred by their constitution. It is also of note that in each case focused on illegality and could have been equally decided under the principles of contract.

Judicial review has also been allowed to question the decision of a disciplinary tribunal constituted under the rules of a sports association on a number of occasions. One such case arose when a front row forward for the South African rugby team who toured New Zealand in 1994 questioned a disciplinary ruling of the New Zealand Rugby Football Union.[67] During the second international between New Zealand and South Africa, La Roux, in what he later described as "a moment of madness", bit the ear of the New Zealand hooker. A judicial committee constituted under the tour agreement between the two national bodies heard the complaint against La Roux and suspended him from all rugby for eighteen months. He appealed the decision to an appeal committee on the ground that the penalty imposed was excessive in all the circumstances and having regard to those imposed in other cases. The appeal was dismissed.

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[65] Unreported, 12 November 1993, High Court, Auckland Registry, M818/93.

[66] Above n 65, 20.

[67] *La Roux v New Zealand Rugby Football Union,* Unreported, 14 March 1995, High Court, Wellington Registry, CP 346/94.

La Roux then applied to have the decision of the Appeal Committee set aside by way of judicial review under the Judicature Amendment Act 1972. The grounds upon which review was sought were, *inter alia*, that the Committee took into account irrelevant considerations, failed to take into account relevant considerations, and reached a decision that no reasonable appeals committee would have made.[68] Eichelbaum CJ found that the major issue was one of the appropriateness of the length of the penalty imposed upon the plaintiff. He commented that one could understand that the penalty seemed high but concluded that the penalty was within reasonable limits. It is significant that His Honour imported the notion of proportionality into his decision as to whether the penalty was reasonable, and approved of the term "grossly disproportionate" used by Tipping J in *Isaac*.[69]

The *La Roux* decision is significant for although the Court took into account the fact that the decision-maker was a domestic tribunal it was willing to examine the decision on grounds of unreasonableness. However, the decision of the Appeal Committee in *La Roux* seems unduly harsh when compared with *Loe v NZRFU*[70] where Loe was suspended from playing for six months by a disciplinary committee after he was found guilty of eye-gouging an opponent during the final of a National Provincial Rugby Championship.

Both cases were widely televised and the NZRFU was concerned about the image of the game and wished to send out a message to players by imposing a penalty which would act as a deterrent to foul play. Now that Rugby is fully professional there will be pressure on the NZRFU to balance the detrimental effects foul play have for the image of the game and the consequential affects on sponsorship with the enormous effect a suspension will have on the livelihood of the disciplined player, especially in light of their near monopolistic position. The doctrine of proportionality might usefully in the future be employed by the Courts in this area.

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[68] Above n 67, 3.

[69] Above n 67, 14.

[70] Unreported, 10 August 1993, High Court, Wellington Registry, CP209/93.

As discussed in the racing cases the Courts have made it clear that they will not countenance a breach of the principles of natural justice on the part of sports associations. In *Coleman v Thoroughbred & Classic Car Owners' Club Inc & Or*[71] Coleman had been placed in each of the first five of a six race series conducted by the defendant. The car club refused to allow Coleman to present an entry form for the sixth race. The club considered Coleman to have been overly aggressive with the officials in earlier races. Hammond J noted that the car club had provisions in its code for disciplinary matters but had not used them. He stated:[72] "It is simply unacceptable for significant sporting bodies to come into Court and say, we have an absolute right to deal with this plaintiff as we see fit..." The learned judge concluded that the acts of the car club in sending out entry forms for the first five races gave rise to a legitimate expectation that he would be entitled to compete. He held this expectation could rise equally by the operation of equity or judicial review. An order was made by the Court that the club allow Coleman to compete in the remaining race. The case illustrates that judicial review may be used not just to ensure that a decision is made fairly but also to ensure that a fair outcome is achieved.

However the Court will not intervene in what are basically decisions of the referee. As Doogue J dryly observed in *Tracey v The Speedway Control Board of New Zealand Inc*:[73] "In these proceedings the applicant in effect seeks the assistance of this Court to be awarded the New Zealand Midget Car Championship for 1986." The plaintiff had sought to challenge the decision of the referee to disqualify him from a particular race. His Honour refused to make findings of fact and dismissed the plaintiff's application for judicial review.

In both the racing industry and in other sports applications for judicial review of decisions made by sports associations are on the increase. It is significant that a

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[71] Unreported, 13 May 1993, High Court, Auckland Registry, M670/93.

[72] Above n71, 14.

[73] Unreported 3 February 1988, High Court, Hamilton Registry, A179/86, 1, see also *Chamberlain v Speedway Control Board of New Zealand Inc* Unreported, 22 September 1992, High Court, New Plymouth Registry, CP21/92.

number of decisions recently challenged have involved a commercial element. The participation of the Lower Hutt City Association Football and Sports Club's top team in the premier division of the Central League would have had undoubted sponsorship implications. Moreover *Otahuhu Rovers Rugby League Club* was in effect a demarcation dispute between two sports sponsors. The *La Roux* case was decided on the eve of rugby turning professional. One of the grounds upon which *Loe* relied when questioning the length of his suspension was the loss of playing opportunities in the northern hemisphere where players are traditionally remunerated. While in *Tracey* and *Chamberlain* prize money and potential sponsorship were at stake.

However, the loss of livelihood or property is not essential as *Coleman* clearly demonstrates, but even in that case, the plaintiff hoped to become a professional driver in the future. It is therefore not surprising that where suspensions and sanctions can have a major affect on a participant's livelihood or property rights that avenues for relief will be sought in the Courts. As professionalisation and commercialisation of sports continues it is likely that there will be increasing claims by participants by way of action for judicial review.

In considering the cases discussed in this section it is important to note that many of the cases discussed above were brought at short notice as plaintiffs have sought urgent relief because of the impending sports fixtures. There has been a lack of time for reasoned arguments and considered reflection. Ostensibly the High Court have accepted that corporatisation is sufficient to found an action in judicial review under the Judicature Amendment Act 1972. The debate in other jurisdictions has in the main focused on the susceptibility of decisions of sports associations to judicial review and the position in New Zealand remains unclear. A clear articulation of the law in New Zealand in therefore required.

IV. CIRCUMSTANCES WHICH WILL RENDER SPORTS ASSOCIATIONS SUBJECT TO JUDICIAL REVIEW.

A. *The Scope of Judicial Review in New Zealand*

In New Zealand there are a number of examples where the Courts have used the instrument of judicial review to supervise decisions made by sports associations and various bodies formed under the association's rules. The issue which has arisen in the jurisdictions discussed below have been directed towards whether a particular sports association is in fact subject to review. A comparison with other common law jurisdictions must necessarily focus upon the scope of judicial review in the sporting arena. In New Zealand, outside the racing industry, there has been no clear articulation as to the exact scope of judicial review in relation to sports associations.

There are a number of indications from the New Zealand Courts that they will be willing to take a wide approach in relation to the amenability of sports associations to judicial review. Although the Court of Appeal decision in *Finnigan* No. 1 considered the issue of the standing of the plaintiffs to bring an action against the New Zealand Rugby Football Union rather than as an issue of the amenability of the Union's decision to judicial review, the case provides support for a wider view as to scope and the type of decisions which may in fact be impugned.[74]

The Court of Appeal's decision was delivered by Cooke P. He conceded that there were no direct contracts between the plaintiffs and the New Zealand Union but stated:[75]

> In cases where an incorporated association is alleged to have acted against its objects but the plaintiff can not show a contract, we think that all the

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[74] For support for this view see Michael J Beloff "Pitch, Pool, Rink, ... Court? Judicial review in the Sporting World?" [1987] Public Law 1995, 108, Jean Warburton "Sporting decisions: should the Courts participate?" [1987] 131, 868, 869.

[75] Above n 51, 178.

> circumstances have to be considered - case by case or category of case by category of case - in order to determine as a question or mixed law and fact whether or not he or she has sufficient standing.

In reaching its decision as to standing the Court of Appeal considered the following matters: although the plaintiffs did not have a direct contract with the Union, they were as club players linked to it by a chain of contracts. The issue of whether the Union was acting against its objects of promoting, fostering and developing the game of rugby was not only a matter of internal management but went to fundamentals. The decision challenged was probably as important as any other in the history of the game in New Zealand. The decision affected the New Zealand community as a whole and so relations with the community and those associated with the sport. While technically a private and voluntary sporting association, the rugby union was in relation to the decision in question, in a position of major national importance. The Court of Appeal concluded that unless persons such as the plaintiff were accorded standing the reality would be that there was not effective way of establishing whether or not the Union was acting within its lawful powers. As a result the plaintiffs would be left without a legal remedy.[76]

The value of *Finnigan No 1* as an indication as to the scope of judicial review is limited by the fact that the issue was one of standing rather than of jurisdiction and because of the unusual factual matrix in which the decision occurred. Baragwanath has suggested that the Court of Appeal decision as a judgment in private law is correct but he has expressed concerns in relation to the public law propositions in the decision.[77] He points out that most of the considerations taken into account by the Court of Appeal may go to discretion to grant or refuse declaratory or injunctive relief once standing has been established but can not be sought in aid of standing unless those considerations are treated as the characterisation of the cause of action into public law. A number of commentators would have argued that this is indeed the effect of the decisions.

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[76] Above n 51, 178, 179.

[77] David Baragwanath "The Tour" (1985) NZLS 221, 226, 227.

Pannick has said that the case is important as indicating a broadening of the scope of judicial review. He cites the public importance of the decision and the importance of the decision to the sport itself as factors which will found a claim to judicial review. [78]Beloff has added that *Finnigan No 1* supports the proposition that courts will review private bodies with monopolistic or near monopolistic powers over a sport.[79]

Later when the decision was returned to the High Court Casey J found that the plaintiffs had established a strong prima facie case that the decision to tour would be ultra vires the objects of the Union and issued an interim injunction preventing the team from leaving New Zealand until the substantive action was heard.[80] He came to the conclusion that because of the nature of the decision and the elements of great public interest including the effects the decision would have on New Zealand's relationships with the outside world and the community at large that the NZRFU must also act reasonably as well as honestly, and must pay regard to relevant considerations for the benefit of New Zealand rugby and must not be influenced by irrelevant considerations in its decisions.

Baragwanath comments that it is a long step to treat the New Zealand Rugby Football Union as being generally subject to civil public law remedies and thus lose a private body's constitutional entitlement to act unreasonably including the obligation to take into account relevant considerations and disregard irrelevant matters. He has doubted whether *Finnigan (No. 2)* will survive future scrutiny without qualification.[81] Despite Baragwanath's assertion it is unlikely that sports associations will, at least in the future, have an unfettered discretion to act unreasonably. Baragwanath cited

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[78] Above n 41, 32.

[79] Above n 74, 108,109.

[80] *Finnigan v New Zealand Rugby Football Union Inc (NZ) (No 2)* [1985] 2 NZLR 181.

[81] Above n 36, 186. Compare the comments of Fisher J in *Waitakere City Council v Waitemata Electricity Shareholders Society Inc*, unreported, High Court, 18 March 1996, Auckland registry, M1524/95. See also: *Hammersmith CBC v Secretary of State for Environment* [1990] WLR, 898, 962 where the House of Lords have held that irrelevant and relevant considerations will come under the ground of illegality.

Shepherd v S A Amateur Football League[82] but in that case Cox J was careful to point out that the plaintiff was not arguing an implied term of reasonableness.

Given the uniqueness of the circumstances surrounding the decision of the NZFRU and the time constraints under which the judiciary was operating the precedent value of the two cases will be limited.[83] In *Finnigan v New Zealand Rugby Football Union Inc (No. 3)* Cooke P confirmed that the precedent value of the line of cases would be limited as they arose from a combination of circumstances which were most unlikely to be repeated. However he went on to say that no sharp distinction exists in New Zealand between public and private law due to the operation of the definition of a statutory power of decision in the Judicature Amendment Act 1972 (as amended) which includes powers to make certain decisions by or under the constitutional rules of any body corporate.[84]

The Privy Council has held that a state owned enterprise which is a company limited by shares is in principle a public body.[85] The Privy Council advised that as the body was established by statute and its shares were held by Ministers it was obliged to carry out its business in the interests of the public. They advised that its decisions may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships took the view that decisions of the corporation in question were in principle amenable to judicial review either under the Judicature Amendment Act 1972 or under the common law. The New Zealand High Court has followed this reasoning to hold decisions of a Regional Health Authority[86] and a

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[82] (1986) 44 SASR 579, 585.

[83] See for discussion: Simon L Watt "Finnigan - NZRFU Judicial handling of political controversy" (1991) 2, VUWLR 147.

[84] [1985] 2 NZLR 190, 198.

[85] *Mercury Energy Ltd v Electricity Corp of NZ Ltd* [1994] 2 NZLR 385, 388.

[86] *New Zealand Private Hospitals Association & Ors v Northern Regional Health Authority* unreported, 7 December 1994, Auckland Registry, CP440/94.

Crown Health Enterprise[87] as being subject to judicial review. The above three cases lend authority to the proposition that bodies which are ostensibly private will be subject to judicial review where the source of their power is governmental but may also support a wider view that decisions which must be made in the public interest will be subject to judicial review.

The New Zealand cases both reported and unreported, indicate that the Courts will be willing to take a wider view of the amenability of sports associations to judicial review. Where the source of the body's power is governmental then it will in principle be amenable to judicial review.[88]However the source of power will not be the sole test. The Court of Appeal have in *Finnigan* and *Stininato*[89] adopted a wide view of administrative law.

B. *A Comparison With Judicial Review of Sports Associations in Other Jurisdictions*

The general consensus in other common law jurisdictions has been that sports associations are voluntary bodies into which the public law remedy of judicial review can not intrude. The leading case in England is *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*.[90] The Aga Khan sought leave to apply for judicial review of a decision of the disciplinary committee of the Jockey Club to disqualify his horse and fine his trainer under the rules of racing. The substantive complaint was based upon the ground that the Committee's proceedings were unfair. The preliminary point at issue was whether the jockey club was a body which was susceptible to judicial review.

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[87] *Napier City Council v Health Care Hawkes Bay Ltd & Ors*, unreported, 15 December 1994, Napier Registry, CP29/94.

[88] *The West Coast Regional Council v The Attorney General & Ors* unreported, 20 December 1994, High Court, Wellington Registry, CP376/94.

[89] Above n 51, n 38.

[90] [1993] 2 All ER 853.

The Court of Appeal found that although the jockey club was created by royal prerogative and it exercised broad and monopolistic powers over a significant national activity it was not in its origin, its history, its constitution or its membership a public body. The Court cited the decision of *R v Criminal Injuries Compensation Board, ex p Lane*[91] and applied the dictum of Lord Parker CJ who had said although the exact limits of the remedy by way of certiorari had never been specifically defined, private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract. In this respect the Court of Appeal followed its earlier decision in *Law v National Greyhound Racing Club Limited*[92] where the plaintiff trainer sought a declaration that a six month suspension of his training licence imposed by the stewards breached the club's rules of racing. The Court of Appeal held on that occasion that the plaintiff's licence as a trainer derived solely from a contract between him and the defendants and therefore the application for a declaration had been made on the correct basis of contract.

It is of note that the Court of Appeal in *Aga Khan* was careful to leave the door open as to whether a sporting association could ever be susceptible to judicial review. Bingham MR noted that for the purposes of the appeal it was unnecessary to decide.[93] Farquharson LJ went further and stated that he could not discount the possibility that in some special circumstances the remedy might lie. He gave as an example if "The jockey club failed to fulfil its obligations under the charter by making discriminatory rules, it may be that those affected would have a remedy in public law".[94] The Court of Appeal concluded that in any event if the defendant acted unfairly then the plaintiff could proceed by way of writ seeking a declaration or an injunction on the basis of contract.

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[91] [1967] 2 All ER 770.

[92] [1983] 3 All ER 300.

[93] Above n 90, 867.

[94] Above n 90, 873.

In *Finnigan No 1* the trial judge Davison CJ noted that counsel were unable to find any reported decision relating to an incorporated society in New Zealand or to any other voluntary association in England, Australia or Canada where the Courts had intervened in the affairs of a society at the suit of a person who was not at the time a member or whose right to work was not affected.[95] That is no longer the case in Australia. The Victorian Supreme Court has held that the Administrative Law Act 1978 (Vic) did not extend the jurisdiction of the Court to allow its review of a decision made by the Committee of the Victoria Racing Club. Beach J held the Victoria racing Club was a private body and its committee functioned as a private domestic tribunal whose jurisdiction was founded on contract and not on a statutory basis.[96] However, the same court found that stewards constituted under the Harness Racing Board were subject to judicial review where current legislation had intervened to "clothe the Board with authority".[97]

In Canada the question of whether a sports association is subject to judicial review does not appear to have arisen. The Supreme Court of British Columbia has held that the disciplining of the two members by the Real Estate Board an incorporated society, was not subject to judicial review.[98] Bouck J held that the board's relationship with its members was contractual and not statutory. Therefore the procedure for judicial review could not be used. However, Bouck J decided the matter on pure technical grounds under the relevant legislation. No arguments were put forward concerning the public nature of the decision. By way of contrast in *Vander Zalm v British Columbia (Acting Commissioner of Conflict of Interest)*[99] Esn CJSC was prepared to assume, without deciding, that the principles of *R v Panel on Takeovers and*

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[95] Above n 51, 171.

[96] *Vowell v Steele* [1985] VR133. See also *Shepherd v South Australian Amateur Football leage Inc* (1986) 44 SASR 579, where Cox J expressed similar sentiments.

[97] *Pullicino v Osborne* [1990] VR 881, 886.

[98] *Ireland v Victoria Real Estate Board* [1987] 12 BCLR (2ed) 97, see also *Mohr v Vancouver, New Westminster & Fraser Valley District Council of Carpenters* [1988] 32 BCLR (2 ed) 104.

[99] [1991] 56 BCLR 37, 43.

Mergers, ex p Datafin[100] would apply to the law of British Columbia. In addition the Supreme Court of Canada has shown a willingness to import the principles of natural justice into the rules of the Articles of Association of a voluntary association where there are contractual rights.[101]

In the United States the head basketball coach of the University of Nevada, a state institution, brought the fairness enforcement procedures of the National Collegiate Athletic Association under the scrutiny of the Supreme Court. However, despite the virtual monopoly of the NCAA over Collegiate Athletics the Supreme Court held, in a 5-4 decision, that the NCAA was not required to comply with due process as it was not a state actor for the purposes of the Fourteenth Amendment.[102] Tarkanian had been found guilty by the NCAA of violations against its rules and in effect directed the university to suspend Tarkanian or face penalties. Tarkanian himself, faced demotion and a drastic cut in pay. Tarkanian issued proceedings claiming that the NCAA had deprived him of liberty and property without due process.

The case turned on an examination of the source of the power to dismiss Tarkanian. All the judges agreed that a private body would be subject to judicial review where the State "enhanced the power of the harm causing individual actor."[103] The majority found that no de facto authority had been conferred on the NCAA by the State whereas the minority held that by acting jointly with the University which was a state institution the NCAA had become a state actor. At the root of the ministry's concerns was the monopolistic powers the NCAA wielded for which Tarkanian, who was not in a contractual relation to the NCAA had no remedy.

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[100] [1987] 1 QB 815 where the English Court of Appeal held that decisions of private bodies could be subject to judicial review if there was a sufficient public element.

[101] *Lakeside Colony of Hutterian Brethren v Hofer* (1992) 97 DLR (4d) 16.

[102] *NCAA v Tarkanian* 488 US 179 (1988).

[103] Above n 102, 485.

Tarkanian, *Ireland* and *Vowell* illustrate the technical difficulty that may ensue in bringing a private body's decision under the definition of the appropriate statute. It is clear that in the USA, Australia and perhaps Canada sports associations will be subject to review if there is sufficient governmental intervention.

The above decisions may be compared with the status of sports associations in Scotland. In *West v Secretary of State for Scotland*[104] the Court of Session held that the supervisory jurisdiction of the Court could be invoked to regulate the process by which decisions were taken by any person or body to whom a jurisdiction, power or authority had been delegated or entrusted by statute, agreement or any other instrument. The Court held that the competency of the application did not depend upon any distinction between public and private law.[105]

C. *A Possible Wider View*

After the ground-breaking decision in *Datafin*[106] the way was open for a wider approach as to the scope of judicial review on the part of the Courts. In that case the Court of Appeal held that the supervision of the Court by way of judicial review would extend to administrative decisions of the Panel on Takeovers and Mergers despite the fact that the Panel was an unincorporated association. The Court of Appeal found that the Panel was operating as an integral part of the Government framework for the regulation of financial activity in the City of London and was supported by a periphery of statutory powers and penalties. As the Panel performed public law duties, was supported by public law sanctions and was under an obligation to act judicially the Court unanimously held that the Panel was amenable to judicial review.[107]

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[104] 1992 SLT 636. See also *St Johnstone Football Club Ltd v Scottish Football Association Ltd* 1965 SLT 171.

[105] Above n 104, 650.

[106] Above n 100.

[107] Above n 100.

Donaldson MR reviewed the cases where judicial review had been granted and stated that the only essential ingredient which would render a body susceptible to judicial review would be a public element which could take many different forms. However he excluded bodies whose sole source of power was a consensual submission to its jurisdiction. [108] Similarly Lloyd LJ rejected the notion that the source of the power is the sole test as to whether a body is subject to judicial review. He commented that it would be helpful to look not just at the source of the power but at the nature of the power being exercised. He said:[109]

> ... if the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then they may, ... be sufficient to bring the body within the reach of judicial review.

As *Datafin* was decided after *Law* it was open to the Court of Appeal in *Aga Khan* to find that the Jockey Club because of its public importance and monopolistic powers was a body which was susceptible to judicial review. However there has been a successive narrowing of the decision in *Datafin* in subsequent cases where plaintiffs have sought judicial review of decisions made by sports associations.[110]

In *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy*[111] the applicant sought judicial review of a decision made by a disciplinary committee under the defendants rules that his name be removed from the list of those qualified to act as chairman of a panel of local stewards. He contended that the disciplinary committee had failed to follow the principles of natural justice. The Court held that the decisions of the Jockey Club and its disciplinary committee were not decisions within the sphere of public law since the proceedings before the stewards were

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[108] Above n 100, 838.

[109] Above n 100, 847.

[110] Richard Gordon and Craig Barbourt "Falling at the Last Fence" (1993) NLJ 158.

[111] [1993] 2 All ER 207.

domestic proceedings and the source of the power was a consensual submission to the jurisdiction.

The Court added the rider that even if the Jockey Club as capable of being reviewed the decision in question did not have any public element about it and relief would in any event have been refused as a matter of discretion. Significantly however both judges stated in obiter that if they were not bound by the authority in *Law* they might have been disposed to conclude that some of the decisions of the Jockey Club were capable of being reviewed by the process of judicial review.[112]

The divisional court reached a similar decision in *R v Jockey Club, ex p RAM Racecourses*.[113] The applicants who were racecourse developers sought judicial review of the Jockey Club's decision not to allocate any fixtures to the applicant's new racecourse. The applicant contended that a report issued by the Jockey Club had raised a legitimate expectation that it would grant a minimum number of fixtures for its new racecourse. The divisional court held on the substantive issue that the applicant could not rely on the report as raising a legitimate expectation. As to the amenability of the Jockey Club to judicial review both judges stated that if it were not for existing authority to the contrary that a decision of the Jockey Club relating to the allocation of fixtures would be susceptible to judicial review. Simon Brown J stated that the Jockey Club's function in regulating racecourses and allocating fixtures bore a striking resemblance to the exercise of a statutory licensing power. He held that when the Jockey Club was exercising a quasi-licensing power he would regard it as subject to judicial review.[114]

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[112] Above n 111, 219, 222.

[113] [1993] 2 All ER 225.

[114] Above n 113, 248.

The subject of judicial review of sports associations again came into question in *R v Football Association, ex p Football League*.[115] Rose J held that the Football Association despite its virtual monopolistic powers and the importance of its decisions to many members of the public was a domestic body whose powers arose from and duties existed in private law only. Therefore it was not a body susceptible to judicial review. He said that to apply the principles honed for the control of the abusive power by government and its creatures to the governing body of football would "involve what, in today's fashionable parlance, would be called a quantum leap".[116] However he did not exclude the possibility that sports associations would always be exempt from the purview of judicial review. He stated that each case would turn on the particular circumstances. *Ram Racecourses* provides a clue as to the types of decisions which might be subject to judicial review while *Massingberd Mundy* illustrates that the Courts have an overriding discretion to refuse a remedy if there is an insufficient public interest. In addition despite the conceptual problems highlighted in the *Football Association* case the door is open for the adoption of a wider view.

D. *The Way Ahead*

At first glance it would appear that other common law jurisdictions have decided that judicial review will not be available to impugn decisions of sports associations. However, on closer examination the way of open for further development. In England judicial review may be available where there is no alternative remedy or where there is a sufficient governmental interest. Likewise in Australia, Canada and the US judicial review may be available in relation to decisions made by sports bodies if they carry out government functions.[117] It is clear from the cases that there is a tension between the demarcation of what may be termed public law and private law.

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[115] [1993] 2 All ER 833.

[116] Above n 115, 899.

[117] Above n 97, n 99, n 102.

In New Zealand although the Court of Appeal or for that matter the Privy Council has not provided a definitive statement as to when a sports association may be subject to judicial review, a number of factors which the Court will look at in deciding whether judicial review is available can be gleaned from the cases.

The most prominent characteristic which the Courts have focused on has been to examine the nature of the body in question and ask whether the source of power is consensual. It was this factor which led the Court of Appeal in *Aga Khan* to conclude that the Jockey Club was not subject to judicial review. On the other side of the coin the Court will look at whether the body has been woven into any system of governmental control as was the case in *Datafin*. A related test is the implied devolution of power or but for test. The Court will ask itself a hypothetical question of whether parliament would legislate in relation to the power being exercised if the body in question was not there.[118] The Courts will examine the role fulfilled by the person or body whose act or decision has been called into question in deciding this factor. It will enquire as to whether a person or body has a monopolistic or near monopolistic power in an area in which the public have an interest, whether the body holds a position of major national importance and whether the particular function which the person or body is performing affects the applicants rights in a way which is peculiar to him or her.[119] Also of importance will be whether the decision is of major importance to the sport and whether the association is obliged to act in the public interest.[120]

It is significant that of all the abovementioned factors the consensual submission to jurisdiction of the body exercising the power has often been determinative.[121] This approach was criticised by Simon Brown LJ in a situation where the body in question

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[118] *R v Chief Rabbi, ex p Wachmann* [1993] 2 All ER 249.

[119] Above n 111, per Neill LJ 221.

[120] Above n 51, n 85.

[121] Above n90, n 96, n 98, n 102.

exercises monopolistic powers and the person has in reality no choice but to accept the jurisdiction of the decision-maker.[122] It is noteworthy that in *Datafin* Donaldson MR excluded bodies where there had been a consensual submission to jurisdiction. It is clear that as the law stands in England those who have a contactual relationship with the decision-maker will not be able to call upon judicial review in order to examine the decision of a sports association. It is noteworthy however that the cases have left open the possibility of judicial review being available to impugn a decision made by a sports association where there is no contract between the parties. In *Ram Racecourses* Simon Brown LJ said:[123]

> ... the nature of the power being exercised by the Jockey Club in discharging its functions of regulating racecourses and allocating fixtures is strikingly akin to the exercise of a statutory licensing power. I have no difficulty in regarding this function as one of a public law body, giving rise to public law consequences. On any view it seems to have strikingly close affinities with those sorts of decision-making that commonly are accepted as reviewable by the Courts.

In his view where a body holds a monopolistic power in an important field of public life and those affected by the decision did not voluntarily or willingly subscribe to the decision-makers rules or procedures then decisions which have an essentially public character should be subject to judicial review.

Despite the dicta in *Massingberd Mundy* and *Ram Racecourses* the English Courts have adopted a narrow approach as regards the amenability of sports associations to judicial review. If there is a contract between the decision-maker and the affected person then judicial review will not be available. If however there is no contract between the decision-maker and the affected person and the decision has a sufficient public element such as a licensing function or involves the making of discriminatory rules then decisions of sports associations may be subject to review.[124]

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[122] Above n 113, 246, 247.

[123] Above n 113, 24.

[124] Above n 90, 873, n 113, 245.

Gordon and Barlow have criticised the narrow approach taken in England. As they rightly point out the availability of an alternative remedy goes to discretion and not jurisdiction.[125] Aldous and Adler[126] have also criticised the narrow approach. They argue that is seems artificial and unnecessary to require evidence of government intervention where powerful associations ascribe regulatory powers for public purposes and affect people who have no contractual link with the association. They also argue that the distinction between contractual and con-contractual powers is artificial.

Similar sentiments have been echoed by Hammond J in *Coleman* where he stated:[127]

> ... even if we were not dealing with an unincorporated society which I have already held is subject to the Judicature Amendment Act provisions quite independent of that consideration the first defendant at least in these proceedings may well be reachable by a more extensive principle of natural justice based on legitimate expectations.
>
> Such a notion causes traditional private lawyers and commercial organisations to recoil in horror, and the standard reply is always, what about the sanctity of private arrangements? The reply to that in turn is in that the twentieth century courts have found it appropriate to ameliorate the worst excesses of the nineteenth century.

Further given the comments of Cooke P in *Finnigan No. 3*[128] it could be argued that the New Zealand situation is more analogous to that of Scotland where there is no sharp distinction between public and private law.[129]

Given the comments of Simon Brown J in *Ram Racecourses* it is possible that but for the availability of contract that judicial review would be available to examine disciplinary proceedings of the Jockey Club and other sports associations with

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[125] Above n 110, 159.

[126] Grahame Aldous and John Adler *Applications for Judicial Review* (2ed, Butterworths, London, 1993).

[127] Above n 71, 14.

[128] Above n 84.

[129] Above n 104.

monopoly powers. This would especially be so if the decision involved a quasi-licensing function such as the ability of trainers, owners and jockeys to participate. Given the precedent of the racing cases in New Zealand where licenceholders are in a contractual relationship with the conferences a New Zealand Court is likely to be willing to scrutinise the decision of a disciplinary tribunal, constituted under a sports association by way of judicial review whether or not there was a contract between the parties.

The question arises as to whether judicial review will only be available were an affected person's livelihood or property is at stake. Such an approach finds support from *Breen* and the dictum of Simon Brown J in *Ram Racecourses*. In *Lower Hutt City Association Football* and *Otahuhu Rovers Rugby League* the member clubs rights could be said to have been infringed. In *Lower Hutt City Association Football* the member club's rights under the Football Association's rules to participate in the top division of a central league had been unlawfully interfered with by the governing body. In *Otahuhu Rovers Rugby League* the member club's right to property in sponsorship was alleged to have been unlawfully appropriated by the governing body. Similarly in *Loe* the plaintiff's suspension had a severe impact on his livelihood. While in *Tracey* the plaintiff's disqualification resulted in a loss of prize money and sponsorship. Similarly in the racing cases a jockey or trainers will be affected by suspension.

However, in *La Roux* and *Coleman* the plaintiffs were competing in amateur events and yet the Court was on each occasion willing to impugn the decision by way of judicial review in order to determine whether principles of natural justice had been followed. This may be indicative of a wider view in New Zealand that freedom and opportunity to compete is also a consideration.[130]

The real distinction between the New Zealand and English cases seems to revolve around the existence of a contract between the parties. If Gordon and Barlow are

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[130] Above n 38, 13, n 71.

correct then this consideration should not affect the question of whether the sports association is subject to review or whether the decision in question has a sufficient public element to attract judicial review. Only at the third stage when considering whether as a matter of discretion to grant judicial review should the question of contract arise. Such an approach would be in accordance with the cases in New Zealand.

V. THE COMMERCIALISATION OF SPORT

As mentioned above the sports and leisure industry contributes significantly to the economy and its commercial aspect can not be denied. Sports is being increasingly recognised for its entertainment value which has resulted in the encroachment of both the media and commercial interests into sport. The stage has now been reached where a number of football clubs in England have publicly listed on the stock exchange.[131] In the United States sport as a purely entertainment business has already taken hold in the upper levels of most major sports.[132] Grayson has pointed out that sport now exists at two different levels. At the top level, where it often exists as a commercial entertainment, it is divorced "in spirit, attitudes and ethics from its grass roots, school, club and village green levels".[133]

Hargreaves explains that there is also a divergence at the top level of sport itself. Some sporting activity is organised as a profit maximising business enterprise. However, while a good proportion of organised sports is highly commercialised the majority do not operate on this basis, their objective being to break even or to operate at least at cost in order to remain financially viable. He points out since the late 1950's sponsorship, advertising and TV money has become an increasingly important revenue for cash strapped sports associations. As a result the owners and controllers

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[131] See "The lure of the public company" *Mercantile Gazette: Business* Christchurch, New Zealand, 29 April 1996.

[132] Burton F Brody "My World with Sport" NDLR (1991) 67, 259.

[133] See above n 3, viii.

of sports organisations and the sports elite treat the audience increasingly as consumers and "power and control is passing out of the hands of the traditionalist amateur interests and into those of an efficiency and publicity-conscious, more business-oriented group of sports administrators."[134]

In Hargreaves' view this has resulted in the larger and better organised interests clashing with the smaller weaker ones. For instance, sponsorship may exacerbate problems of division between the top and bottom levels of sport as there is no guarantee that the additional resources will in fact trickle down to the lower levels. He concludes that sports have now entered into a world where they can never be secure as the more reliant they become on commercial interests the more opportunity there is for the corporate sponsor to enforce conditions. He gives examples of changes made in the rules of national sports in order to attract investment from sponsors and the media. The points which Hargreaves makes illustrate the additional pressure under which administrators will operate as sports become more commercial. The availability of judicial review will act as an added safeguard against such pressure.

The requirement to produce revenue for an association may also put pressure on the athletes to sacrifice athletic values in the interests of entertainment and profit. Brody commenting on the situation in the United States has likened professional sports franchises to the railway robber barons of an earlier day. He argues:

> Concentrated focus on profit makes athletic competition subservient to its ability to produce income. Sportsmanship, fair play and team work are pushed to the background. Athletes and athletic ability have no worth beyond the ability to generate revenue. Professional sports have more to do with American corporate culture and its desire to be part of major events than they have to do with anything related to athletics and athleticism.[135]

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[134] Above n 6, 114, 117.

[135] Above n 132, 259.

Commenting on the bureaucracy of the NCAA he has warned that the costs involved in sport providing for commercial entertainment may be the sport itself.

The racing industry provides a good example of the complex nature of commercial involvement in sport. At one level the Racing Conferences and member racing clubs are ostensibly non-profitmaking but rely heavily on grants from the commercially driven Racing Industry Board and on sponsorship. The object of the blood stock industry and the totalisator betting agency on the other hand is to maximise profits. Some indication of the magnitude of the industry is shown by the Racing Industry Board's total revenue for 1995 which was over $88,000,000.00 while total stake money paid out was close to $50,000,000.00.[136] In addition the industry provides a livelihood for jockeys, trainers and a host of other participants including owners, veterinary surgeons and horsebreeders. The *Johnson* case gives a clear example of how a disciplinary tribunal can have an enormous effect on a sports person's livelihood.

An indication of how quickly some sports have moved into the commercial arena is provided by the example of the New Zealand Rugby Union. The sport has transferred overnight from an ostensibly amateur game controlled by a non-profit making association to a professional commercially packaged entertainment. Sanzar, the accord regarding television rights reached between the national unions of New Zealand, South Africa and Australia is expected to see US$555 million flow into rugby over the next ten years.[137] Players from provincial level upwards can expect to earn between $15,000.00 to $180,000.00 or more in one season.[138]

Baragwanath who has been critical of the decisions of the *Finnigan* cases has conceded that there is a general public interest in permitting all citizens to work

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[136] New Zealand Racing Industry Board *Annual Report 1995*.

[137] New Zealand Rugby Union *1955 Annual Report*.

[138] Nigel Stirling "Professional Rugby - Contracts for the All Blacks" *Lawlink Magazine*, New Zealand, November 1995, 8, 9.

within their own area of qualification or experience.[139] The vast majority of cases brought by way of judicial review in the racing industry have concerned suspensions of jockeys or trainers under disciplinary rules which have a direct effect on their livelihood as the governing bodies have a monopoly on the activity. Judicial review proceedings will provide a valuable safeguard of those rights.

Most of the non-racing cases in which judicial review has been sought to impugn the decisions of sporting associations have had a commercial aspect. As Williams J noted in *Otahuhu Rover Rugby League* that case reflected a "sea change" that had occurred in the last decade whereby amateur sporting activities have been gradually but steadily absorbed into the world of commerce. He characterised the dispute as ostensibly between the ARL and the clubs but in essence a demarcation dispute between two large commercial sponsors active in the sports entertainment business.[140]

The protection of member clubs against the governing body and the protection of the players themselves, against arbitrary decisions which may affect their livelihood, or discriminate against them or put them at risk will be important as commercial interests put pressure on sports administrators. For instance, suspensions, disqualifications which may be imposed and the consequential loss to players may be out of all proportion to the offence in order to satisfy sponsors as to the image of the game. Rules might be changed in order to render the sport more visually appealing which could put the players safety at risk or reduce the enjoyment factor in the game.

It is likely that as sports become increasingly commercialised that there will be a greater demand for the judicial review procedure. This will in part be due to the effect which decisions of sports associations can have on the livelihood of players and other participants and the increased likelihood that governing bodies will conflict with clubs at the lower or grassroots level by sacrificing their interests in the interests of revenue from sponsorship and demands of the media.

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[139] Above n 77, 226.

[140] Above n 65, 2.

In principle decisions of sports associations and their constituent bodies will be subject to judicial review even if they form into limited liability companies. In each case the scope of judicial review will depend upon the nature of the decision in question. Where a decision concerns entering or determining a commercial contract to supply goods and services it is unlikely that the decision would be subject to judicial review in the absence of fraud, corruption or bad faith.[141] Clearly in *Otahuhu Rover Rugby League* the clubs could not have challenged the ARL's decision to contract with Lion Breweries. However, even when a purely commercial decision is being exercised the parent association may still have a duty to consult with member clubs and players. Such a duty would arise from the rules of the association[142] or where the decision goes to the very heart of the association's undertaking.[143] In each case it will depend on whether the particular decision has a sufficient public element to warrant judicial review.

VI. THE FUTURE ROLE OF JUDICIAL REVIEW IN SPORTS ASSOCIATIONS - A CASE FOR REFORM?

A. *Legislative Reform*

The future role of judicial review as an instrument for impugning decisions of sports associations and the decisions of persons with delegated powers under the rules of such associations remains uncertain. In New Zealand, there have been an increasing number of cases where judicial review has been sought against decisions of sports associations. With the increasing commercialisation and professionalism in sports the demand for judicial review is likely to increase. A narrow approach as regards the scope of judicial review would result in judicial review being available only where

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[141] n 85, 391. See also *New Zealand Stock Exchange v Listed Companies Association Inc* [1989] 1NZLR 699, 706, where the Court of Appeal held that the exercise of a right under contract was not a statutory power of decision.

[142] n 86, 34, 35.

[143] n 87, 29.

there is no contract between the decision-maker, a sufficient level of governmental interest and the affected person has some property or vocational right at stake. However there is no certainty that even the narrow view will be accepted.

Therefore, where for instance a sports association is in a monopolistic position in relation to a specific sport and the affected person is not a member of the association then that person may be left without a remedy. If their livelihood depended upon participation within the industry, some relief may be available under the doctrines of unreasonable restraint of trade or interference with a right to work. However the rights accorded to affected persons will be less than those grounds available under judicial review. The cases of *McInnes v Onslow-Fane*[144] and *Stininato* demonstrate the difficulty that an applicant will have in proving that a sports association has in fact acted unfairly.

All this raises the question of whether legislation should be introduced in order to provide protection for players and other participants against what might otherwise be uncontrolled regulatory power. Following the United States Supreme Court decision in *Tarkanian* several states and Congress initiated legislative action in response to the public perception that the NCAA's enforcement procedures did not afford due process to investigated parties.[145] Due process focuses on, inter alia, liberty and property. Liberty includes the right not to be deprived of freedom to engage in some significant area of human activity.[146] Therefore the rights under due process will be wider than the deprivation of livelihood and are likely to extend to reputation, honour, integrity and the right to participate in sport. Beloff indicates that it would take legislation to bring all "over-mighty subjects which are unarguably private within

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[144] [1978] 1 WLR 1521.

[145] Robin J Green "Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations" [1992] 42 DLJ 99, 134, 135.

[146] Above n 145, 106

judicial review's control".[147] The case for and against intervention are examined below.

B. *Points For and Against Judicial Review*

1. The public element in sport

Sport is about fair play. It has as its cardinal principle, the Corinthian ideal that it is important not so much to have been victorious as to have taken part. The same standards should be required of associations governing sport. Grayson has made the comment that international and domestic sport has time and time again proven to be unfit to govern itself both on and off the field of play.[148] Jan Cameron claims that sport conveys messages which confirm the dominant ideas and values of society (for good or ill). She argues that sport helps reinforce these values and ideas. She gives as examples values such as the submission to authority, acquiesence to rules, the importance of co-operation, team work, competitive individualism and reward for work, patriotism and loyalty.[149] If it is accepted that sport plays this role in society then it is in the public interest that sports associations adhere to the same rules when making decisions affecting participants. The essence of sport is that participants must observe a set of rules and play fairly. Sport has a position of major public importance in New Zealand and, it is therefore in the public interest that associations governing sport act fairly.[150]

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[147] Above n 26, 147.

[148] Above n 3 xxiii.

[149] Jan Cameron "The Sociology of Sport" in Harvey C Perkins and Grant Cushman (eds) *Leisure, Recreation and Tourism* (Longman Paul Limited, Auckland, 1993), 182.

[150] This principle has been recognised in the New Zealand Rugby Union's *Rules for Disciplinary Hearings* (2nd Revised ed, NZRFU, 1994) "Failure to implement and apply the rules according to their tenor and intent will not only undermine the integrity of the disciplinary regime itself but will also bring the game into disrepute."

2. *An onerous burden on the courts*

One argument against allowing judicial review of decisions made by sports associations is that it would place an unnecessary burden on the Courts. Rose J in *Football Association ex p Football League* stated that if judicial review were applied to the governing bodies of sports associations there would be a misapplication of increasingly scarce judicial sources.[151] Beloff argues that such an argument has little intellectually to commend it and pragmatically is usually shown to be ill-founded.[152] This argument has much force. Many players and participants will be in a contractual relationship with the governing body and others will have an action under the doctrine of interference with the right to work. Such litigants could apply for injunctive relief in any event. This however has not resulted in disgruntled litigants descending on the Courts like the hordes of some fabulous Khan. Nor should the sanction of the Court in awarding costs against an unsuccessful litigant be underestimated.

In addition as Lord Justice Wolf has pointed out the procedure for judicial review has many benefits.[153] Proceedings do not become bogged down in discovery, the courts can provide relief with remarkable rapidity and the remedies are discretionary. It is noteworthy that in an action contract damages would be available and remedies are available as of right.

3. *An instrument to control the abuses of government misused?*

A stronger argument against the extension of judicial review concerns the conceptual strain that may result if it is extended to sports associations which are essentially voluntary and self-regulating. Rose J was of the view that such an extension of the principles honed for the control of the abuse of power by government would involve

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[151] Above n 115, 949.

[152] Above n 74, 100.

[153] Lord Justice Wolf *"Judicial Review in the Commercial Arena"* The Denning Lecture 1987, 3, 10, 11.

a "quantum leap".[154] This argument has some force. The modern conceptual justification for judicial review is based on Dicey's view of administrative law. The ultra vires principle is directed towards assuring that administrative bodies do not exceed the powers which parliament has given them.[155] Craig points out that it is difficult to apply the ultra vires principle to non-statutory bodies as they do not derive their power from statute and therefore judicial review can not be rationalised through the idea that the Courts are delineating the ambit of parliament's intent.[156]

On the other hand, Black would argue that it is necessary to develop a non-unitary notion of "public" based on the understanding of the nature of self-regulating bodies as mediators between different systems of society, and not as mediators between the State and the individual. She contends that such an approach would allow for a flexible application of the principles of judicial review which would take into account the degrees of regulation, autonomy and the way in which they vary in different cases in relation to different functions or different decisions. She argues that such an approach would focus on the nature of the decision or action and ask whether that act or decision was public and not whether the body itself could be defined as public.[157] Lord Woolf has extra judicially supported such a view based on the principles in *Datafin* which would in His Lordship's opinion provide protection for citizens against the activities of bodies performing public functions where there are no alternative remedies.[158] There is no doubt that these arguments go a good way to shortening the "quantum leap" and the conceptual strain becomes less apparent.

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[154] Above n 115, 849.

[155] P P Craig *Administrative Law* (3ed, Sweet & Maxwell, London, 1994), 5.

[156] Above n 155, 15.

[157] Above n 4, 52, 53

[158] Above n 153, 12.

4. *Sanctity of contract*

Closely allied to the conceptual argument is the argument that private bodies should not be subject to public law remedies. Such measures it is argued interfere with the liberty of the citizenry. It is this rationale which together with the conceptual argument underlies the reluctance of the Courts to impugn decisions by way of judicial review.[159] This is particularly so where the affected person has a remedy available in contract. However as Simon Brown J recognised in *Ram Racecourses*, where a sports association is in a virtual monopoly position there will in reality be no true consent. This principle was also recognised in *Finnigan No 1*. Black has argued that contract may be used as a means of control as well as a means of exchange.[160] If it is recognised that judicial review will only be available where the sports association stands in the position of a virtual monopoly then the freedom of contract argument has much less force.

5. *Protection of livelihood and property*

When La Roux was banned from playing rugby for 18 months by the Appeal Committee of the New Zealand Rugby Football Union had judicial review not been available he may have been left without a remedy. Eichelbaum CJ accepted that the penalty seemed excessive. The Rugby Union had in mind when imposing the penalty the maintenance of the reputation of the game. If in the future when similar decisions are made with the loss of sponsorship in mind it will be important that such tribunals exercise their powers according to law and are not swayed by considerations not contemplated in the rules. Similarly in *Johnson* the six month suspension he received had an enormous effect in his earnings and ability to work. The commentators

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[159] Sir William Wade *"New Horizons in Administrative Law"* Commonwealth Law Conference (Auckland, 1990).

[160] See above n 4.

unanimously support the availability of judicial review in situations where a person's livelihood or property is at stake and there is no alternative remedy.[161]

6. *Sports should be in control of sports*

In *Cowley v Heatley*[162] Sir Nicholas Browne-Wilkinson VC expressed the view that sports associations should not be unduly hampered in their work without good cause. The argument being that to impose the principles of judicial review on such a body places too onerous a burden on what are essentially voluntary organisations. This argument has some force when applied to local clubs or small sports associations. The view also has recognition in New Zealand where deference is paid to the fact that sports people are the best judges of the merits of a decision. In addition Wade points out that it is undesirable if sports associations and similar bodies become hidebound, creating a formalistic civil service mentality.[163] The argument has less force however when the sports association has a virtual monopoly on its sphere of activity and can affect the livelihood of those participating within its sphere. These arguments disregard the flexibility of judicial review as an instrument of intervention, further the Courts are well able to tailor their approach according to the nature of the body and the decision. The Courts also have an overriding discretion not to grant relief where breaches of the rules are technical or minor.

7. *The reflexes of sports associations*

Beloff has argued that the availability of judicial review to impugn decisions made by sports associations would tend to improve the standards of decision-making bodies in order to avoid the risk of intervention from the Courts.[164] This argument is borne

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[161] Above n 159, n 113.

[162] (1996) The Times LR 24 July, 1986.

[163] Above n 159, 442.

[164] Above n 74, 100.

out with the recent changes to the racing judicial system under the Racing Amendment Act 1995 and the changes to the rules of the Racing Conference and Harness Racing New Zealand. The main thrust of the changes was to bring in an independent professional judiciary because of the perceived lack of independence and inadequacy of the previous judicial committee and appeal tribunal system.[165] Judicial control of racing has been handed over to professional personnel. Many of the judicial review cases were used as training devices.[166] The Rugby Union has also recently revised its rules to dispense justice in a "fair, consistent, independent and expeditious manner".[167] These changes give a clear example of the benefits of the availability of judicial review to players and participants in sport. An awareness of the procedures for natural justice and a willingness to follow the rules will save costs for the industry and provide a fairer and more predictable system for the participants. The fair and efficient dispatch of disciplinary proceedings is likely to see a decrease in applications for judicial review to the High Court.

8. *The need for legislation*

As discussed above, the New Zealand courts seem to be taking a wider view of the scope of judicial review than other jurisdictions. Although legislation might be called for in England, in New Zealand the need is less obvious. It is likely, given that there is no clear distinction between public and private law in New Zealand, even at common law, where a participant's livelihood or property or indeed right to participate has been infringed, that judicial review will be available to supervise the decisions of sports associations.

One of the goals of the Hillary Commission is to improve the organisational infrastructure and programme delivery systems for sport, fitness and leisure. While

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[165] See "Charges Arising from the New Rules of Racing - Guidance Notes for Owners and Licenceholders" *New Zealand Racing Calendar*, Wellington, June 1996.

[166] See "Judge after 'younger folk' for panels" *The Sunday Star-Times*, New Zealand, 5 May 1996.

[167] Above n 150.

one of its guiding principles is to foster the independence of national sport and recognise that "sport is in charge of sport".[168] The availability of the instrument of judicial review to supervise decisions made by sports associations and bodies formed under these rules will go a long way towards meeting those goals. The remedy is flexible enough to take account of the differing nature of sports associations and the different types of decisions which are made by them in order to ensure that sports associations are not unduly oppressed while ensuring fairness to participants.

VII. CONCLUSION

In New Zealand, at least, it would appear that the instrument of judicial review will continue to be available to participants who wish to challenge decisions made by sports associations and their constituent bodies. This may be an indication that both plaintiffs and defendants find the procedure and remedies to be suitable and convenient. Convenience alone should not be a reason for allowing a tool which was developed to control the abuses of governmental power to intrude into what are ostensibly private organisations. However, the wider view adopted as to the scope of judicial review seems to be a recognition of the regulatory power which many sports associations administer.

Doubt remains as to just how wide a view the New Zealand courts will adopt. This is indicative of the tension, which is also evident in other common law jurisdictions, between the recognition of the freedom to strike one's own bargains and the right to be free from interference by government on the one hand and a recognition of the enormous regulatory power which some domestic bodies do in fact have over participants. The courts are likely to intervene if they can find sufficient government intervention or perhaps a sufficient public element.

The division between public and private law has not been fully recognised by the New Zealand courts. Sports associations can wield near monopolistic powers over a

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[168] Hillary Commission *Corporate Plan 1994-95* (Wellington 1994).

specific sport which can affect the livelihood of participants and indeed the liberty of persons to participate in an important civic activity. Sports reinforce common values of society in general including the ideal of playing fairly and by the rules. Surely sports associations should be bound to follow these same rules and ideals. The public element of sports should not go unrecognised by the courts. Judicial review is an instrument which can adequately supervise the decisions made by sports associations and is flexible enough to ensure the speedy resolution of disputes without intruding too far into the decisions of the associations concerned.

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