GABI WEHRLE

JUDICIAL REVIEW OF SELF-REGULATORY BODIES

LLB(HONS) RESEARCH PAPER
PUBLIC LAW (LAWS 505)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

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ABSTRACT

This paper deals with the questions of whether self-regulatory bodies are judicially reviewable and whether, on the basis of theoretical and practical considerations, they should be subject to judicial public law scrutiny.

Self-regulatory bodies may be subjected to judicial review both in New Zealand and in England. The tests of susceptibility to review applied in these two jurisdictions are vague and lack conceptual coherence. In New Zealand, judicial review proceedings may be brought against a self-regulatory body which is carrying out a public function. While the meaning of "public function" is uncertain, it is clear that in New Zealand, unlike in England, a self-regulatory body can be subject to judicial review even if the government has no direct or implied involvement in its activities.

This paper contends that the alternative mechanisms by which self-regulatory bodies can be held accountable are inadequate considering the nature and scope of the power which these bodies may wield. It proposes that self-regulatory bodies should be subject to public law standards of decision-making since they operate, or purport to operate, in the public interest. Subjecting self-regulatory bodies to judicial review is consistent with the theoretical basis of the judiciary's public law supervisory role. The application of judicial review principles to these private entities will not undermine the advantages of self-regulation unless the courts apply the traditional grounds of review too strictly, without taking account of the particular environment in which self-regulatory bodies operate.

Word Length

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,800 words.

I INTRODUCTION

A self-regulatory scheme is one in which competing industry participants develop and enforce rules which govern their behaviour in the market. The member organisations confer the power to administer the scheme on a self-regulatory body. These self-regulatory bodies may exercise significant regulatory power over the member organisations. They may also exert power over third parties in some circumstances. This paper is concerned with judicial review as a means of controlling the exercise of power by self-regulatory bodies.

Self-regulation is already well established in some sectors of the economy. The Banking Ombudsman, the Insurance and Savings Ombudsman and the Advertising Standards Complaints Board are examples of self-regulatory bodies. Since self-regulation is a natural consequence of the state's retreat from the market, the voluntary establishment of private sector ombudsman-type self-regulatory bodies is likely to become an increasingly common phenomenon.[1] The Ministry of Consumer Affairs is actively promoting self-regulation as a more effective means of controlling market practices than regulation by government agencies.[2]

Judicial review is traditionally concerned with controlling power exerted by governmental bodies. Very little consideration has been given to whether power exerted elsewhere in society should also be subject to judicial review given that its effects on individuals is comparable in some situations.[3] Sir Ivor Richardson has observed that lawyers:[4]

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[1] Dr RE Harrison "Deregulation, Privatisation and Corporatisation of Crown Activity: How will the Law Respond?" (New Zealand Law Conference: The Law and Politics, Wellington, March 1993) 102, 108.

[2] Ministry of Consumer Affairs *Market Self-Regulation and Codes of Practice: Number Three in a Series of Policy Papers* (Wellington, 1997) 11.

[3] R Cranson "Reviewing Judicial Review" in G Richardson and H Genn (eds) *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Clarendon Press, Oxford, 1994) 45, 46.

[4] Sir I Richardson "Changing Needs for Judicial Decision-Making" (1991) 1 Journal of Judicial Administration 61, 63.

> ...have hardly begun to explore the philosophical approaches underpinning various branches of the law [including administrative law] to bring legal thinking into line with changed economic, social, political and administrative thought in [New Zealand].

The confusion apparent in the English and New Zealand case law on the amenability of self-regulatory bodies to judicial review reflects this dearth of principle. The judiciary is unsure of its proper role in controlling the exercise of power in society. The decentralisation of public power has raised important questions about the distinction between public and private law.

The nature of self-regulatory bodies is described in part II of this paper. Part III examines the basis on which these bodies may be subjected to judicial review in New Zealand and England. Whether self-regulatory bodies can justifiably be subjected to the judiciary's public supervisory jurisdiction is discussed in part IV. This involves an examination of the alternative mechanisms of accountability available in respect of such bodies, the theoretical underpinnings of judicial review, and the practical implications of subjecting self-regulatory bodies to judicial review. Parts V, VI and VII deal with issues of standing and judicial review grounds and remedies as they relate to public law supervision of these bodies. The conclusion is stated in part VIII.

II SELF-REGULATORY BODIES

A Definition

In this paper, the term "self-regulatory bodies" refers only to non-statutory and non-governmental entities. Bodies are described as "self-regulatory" if they comprise, at least in part, of members who engage in the activities which they seek to regulate. The members of the bodies have a common interest in maintaining standards within their particular fields of endeavour. Some self-regulatory bodies,

such as the Banking Ombudsman, have the power to adjudicate on complaints received against member organisations. They exercise discretionary power according to codes of practice which have been devised by the industries within which they operate. These entities usually have the authority to discipline members who fall short of the standards set in the codes. A key defining feature of self-regulatory bodies is that they operate, or purport to operate, in the public interest.[5] This is not to say that self-regulation does not have advantages for the industries which operate such a system.

Self-regulatory bodies are established for a number of reasons. An industry may take the initiative to set up and operate a self-regulatory body to enhance the public image of its member organisations. Alternatively, the threat of legislative restrictions may prompt an industry to establish a self-regulatory regime. The threat of severe statutory restrictions on advertising, for example, has resulted in a high degree of commitment to self-regulation in the New Zealand advertising industry. It is to the industry's advantage to ensure that products such as breast milk substitutes, diet foods, toys and financial products are advertised responsibly. The industry avoids strict legislative controls by demonstrating to the government that it can perform this important regulatory function itself. The existence of the scheme allows the advertising industry to credibly dismiss lobby groups' calls for severe restrictions on certain types of advertising.[6]

B Advantages of Self-Regulation

Self-regulation has a number of advantages over government regulation as a means of controlling the behaviour of goods and service providers in the market.[7] Codes of practice are easily adapted to reflect changing market conditions. Statute-based

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[5] See AC Page "Self-Regulation: The Constitutional Dimension" (1986) 49 Modern Law Review 141, 164; Ministry of Consumer Affairs *Guideline on Developing a Code of Practice* (Wellington, 1993) 1.

[6] G Wiggs, Executive Director, Advertising Standards Authority "The Role and Value of Business Self-Regulation" (Unpublished Essay, 1996) 1-7.

[7] See n 2 above, 7-8.

government regulatory systems are, by contrast, inherently inflexible because the process of legislative amendment is so cumbersome.

A self-regulatory system's code of practice may be interpreted according to its spirit. This means that member organisations may not use technical loopholes to avoid abiding by the standards embodied in the code. The avoidance of "black-letter lawyering" is thus an attractive feature of self-regulation as compared to statutory, governmental regulation.[8]

Self-regulatory systems can provide low-cost and accessible complaints and disputes resolution mechanisms. A code of practice may be drafted in non-legalistic language which is readily understood by the public and member organisations. It is less alienating than a piece of legislation. Self-regulatory schemes may encourage compliance to a greater extent than governmental regulation. This is because of the commitment fostered by "ownership" of the scheme and the associated code. Self-regulation provides an opportunity for an industry sector to place the principles of general consumer law into the context of the particular field of activity. Regulatory legislation is usually universal and is therefore drafted in general terms. The rules in an industry-specific code of practice may be expressed more pragmatically.

C Key Features

Wiggs has identified several features which ensure the success of the self-regulatory model.[9] Justice must be done and must be seen to be done. Complaints must be dealt with fairly, efficiently and without bias in favour of the self-regulatory body's members. If the adjudication panel fails to do this, the body will lose public credibility. If a body operating in a significant sector of the economy is not upholding the public interest, the government may replace it with a statutory system. Self-regulatory bodies are inevitably vulnerable to the criticism

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[8] Above n 6, 7.
[9] Above n 6, 3-7.

that they favour their own members ahead of the public. Appearances are therefore very important. The criticism can be curbed by ensuring that the public is adequately represented in the self-regulatory body. Consumer organisations are frequently asked to nominate public members to participate in the operation of the body. Self-regulatory bodies must operate transparently to engender the confidence of the public and government. They can achieve this by releasing all decisions to the media. Wiggs suggests that undertaking wide consultation on new and revised codes is an important means of enhancing confidence. Wiggs takes the view that the Executive Director and staff of the self-regulatory body should not have had previous involvement in the industry to reinforce its independence. Wiggs identifies the commitment of member organisations to self-regulation as a key determinant of the success of self-regulation. This is not surprising considering that a private organisation has no inherent authority to exert regulatory power. The jurisdiction of a self-regulatory body is founded upon the consent of its members. The collective nature of the power exerted by self-regulatory bodies is the hallmark of these entities.[10]

D Nature and Scope of Power Exerted

Private bodies exert power in the sense that their acts and decisions may affect the interests of third parties. This may be referred to as market power, since the behaviour of these entities in the market may affect the economic position of those who come within their spheres of influence. The board of directors of a large company exerts enormous power when it decides to close a processing plant in an area of high unemployment, for example. The exercise of such power is subject to private law. An individual aggrieved by the negligent exercise of private power, for example, may seek a remedy in tort. A competitor aggrieved by the anti-competitive behaviour of a private entity may seek redress under the Commerce Act 1986.

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[10] J Black "Constitutionalising Self-Regulation" (1996) 59 Modern Law Review 24, 27; AC Page, above n 5, 144.

Regulatory as opposed to market power is normally associated with governmental bodies. The regulatory power of these bodies is conferred by statute, since private entities are required by law to submit to their regulatory jurisdictions. Most private entities, on the other hand, lack the authority to control the activities of others through regulation. Self-regulatory bodies, as private entities performing a regulatory function, are therefore something of an anomaly. The question arises whether the public law standards of good administration applied to governmental bodies in judicial review should also apply to self-regulatory bodies.

The entities which self-regulatory bodies may control fall into two distinct categories. First, they have the discretionary power to control their member organisations. This power may be conferred by the member organisations through contracts with the self-regulatory body, as in the case of the Banking Ombudsman, or by informal agreement, as in the case of the Advertising Standards Authority. Secondly, self-regulatory bodies may indirectly affect non-members who operate within their spheres of influence. For example, in adjudicating on whether its members may publish certain advertisements, the Advertising Standards Complaints Board indirectly controls advertisers' access to publication. This is because the Board controls a significant proportion of New Zealand's advertising media. Advertisers are potentially subject to the Board's non-statutory jurisdiction even though they have not agreed to submit to it.

III ARE SELF-REGULATORY BODIES JUDICIALLY REVIEWABLE?

A The Position in England

Prior to the ground-breaking decision of *Council of Civil Service Unions* v *Minister for the Civil Service*,[11] the position in England was that judicial review was available only in respect of the exercise of statutory power. The House of Lords

[11] [1985] 1 AC 374.

in that case extended the scope of judicial review to the exercise of prerogative power. The nature and subject-matter of the power, not its source, were considered to be determinative of whether judicial review was available in respect of the Executive's acts and decisions.[12]

The activities of private bodies were not considered to be susceptible to judicial review until 1987. In that year, the English Court of Appeal heralded an expansionist approach to the scope of judicial review in the watershed decision of *R* v *Panel on Take-Overs and Mergers, ex parte Datafin Plc.*[13] The court unanimously held that the High Court had jurisdiction to review the Panel's decisions, even though the powers which the body exercised were derived neither from statute nor from the prerogative. As in *Council of Civil Service Unions*, the court rejected the source of power as the sole indicator of amenability to judicial review,[14] but took a giant leap by subjecting a non-governmental body to its public law scrutiny. Sir John Donaldson MR formulated the test of amenability to judicial review as follows:[15]

> Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is consensual submission to its jurisdiction.

At its broadest, the *Datafin* principle could therefore be said to be that a private body carrying out a public function may be susceptible to judicial review unless it derives its power exclusively from contract.

The judgment gives no real guidance as to what constitutes a public function or

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[12] Above n 11, 407 (per Lord Scarman), 409-410 (per Lord Diplock), 417-418 (per Lord Roskill).
[13] [1987] QB 815.
[14] Above n 13, 838 (per Sir John Donaldson MR), 847 (per Lloyd LJ).
[15] Above n 13, 838.

element. A "governmental interest" test has emerged in the case law[16] and has superseded the public element indicator of amenability to judicial review. The courts apply a "but for" test, where they consider whether the government would step in to regulate the activity in question if it were not for the existence of the decision-making body. This test precluded judicial review in the English Court of Appeal decision of *R* v *Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann*,[17] in which the applicant sought judicial review of the disciplinary functions of a Chief Rabbi who had declared him unfit to continue in his rabbinical office. The court dismissed the application on the basis that the government has no interest in regulating religious life. The courts also ask whether the self-regulatory body is woven into a system of governmental control. The courts look for evidence that the regulatory system "which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of government concern".[18] This focus on the context of the body's powers rather than on the nature of its functions is a narrowing of the *Datafin* principle.

The tentatively stated rule in *Datafin* that bodies which derive their authority solely from consensual submission to their jurisdiction will be immune from judicial review has been successfully invoked by a number of institutions seeking to avoid judicial scrutiny. In *R* v *Disciplinary Committee of the Jockey Club, ex parte Aga Khan*,[19] the court was heavily influenced by the fact that the Club's source of power was contractual in deciding that the disciplinary committee was immune from the court's supervisory jurisdiction. Similarly in *R* v *Insurance Ombudsman Bureau and the Insurance Ombudsman, ex parte Aegon Life Assurance Ltd*,[20] the court held that the contractual source of the Ombudsman's power precluded

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[16] *R* v *Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1992] 1 WLR 1036; *R* v *Football Association, ex parte Football League* [1993] 2 All ER 833; *R* v *Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909.

[17] Above n 16.

[18] Wachmann, above n 16, 1041.

[19] Above n 16.

[20] Unreported, 16 December 1993, Divisional Court, CO1609/93 (Lexis Transcript).

judicial review.

Whether any particular self-regulatory body is susceptible to judicial review in England is still very uncertain. The flexible approach to assessing susceptibility to judicial review espoused by Rose J in *Aegon Life Assurance Ltd* has left the courts with enormous discretion as to the scope of judicial review. The conceptual deficiency of the tests which have emerged introduces even further uncertainty. The "but for" test may provide a strong case for subjecting to judicial review a self-regulatory body which was established in response to a government threat to impose a statutory scheme. Cane, however, points out that if evidence were required that the government would step in but for the existence of the body, this would exclude from judicial review those regulatory schemes to which the government had simply not turned its mind.[21] The "but for" test is an attempt to anchor the broadened scope of judicial review to its traditional arena, which is the exercise of power by government. It does not, however, provide a conceptually coherent basis for determining amenability to judicial review. The "governmental interest" test is similarly deficient.

B The Position in New Zealand

1 Judicature Amendment Act 1972 and common law judicial review

In New Zealand, judicial review is available both at common law and under the Judicature Amendment Act 1972 ("the JAA").[22] The JAA offers a simplified procedure for review by the High Court but was not intended to extend the scope of review beyond that which is available at common law.[23] The JAA has, however, been interpreted to have a substantive effect on the scope of the

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[21] P Cane "Self-Regulation and Judicial Review" [1987] Civil Justice Quarterly 324, 338.
[22] *Mercury Energy Ltd* v *Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 388.
[23] NZPD, vol 414, 3311, 3313, 3315, 28 September 1977; G Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) 31; M Taggart "State-Owned Enterprises and Social Responsibility: A Contradiction in Terms?" [1993] New Zealand Recent Law Review 343, 358.

judiciary's power of review. Justice Cooke in the Court of Appeal decision of *Budget Rent A Car Ltd* v *Auckland Regional Authority* opined that the JAA might confer a wider scope of review on the New Zealand courts than is allowed at common law.[24] This analysis seems strained in light of section 4 of the JAA which limits the situations in which the court may grant relief to those in which the applicant would have been entitled to relief at common law. There does not seem to be any room for an interpretation that the section confers power to review in circumstances where the court could not have reviewed at common law. Taggart does not believe the jurisdiction-conferring interpretation of the JAA to be correct since it implies that the High Court's inherent jurisdiction is susceptible to legislative modification. The judiciary, as the guardian of the constitutional principle of access to the courts, is slow to accept this proposition in relation to privative clauses and would similarly resist erosion of its powers of judicial review.[25]

Parliament clearly did not intend the High Court's supervisory jurisdiction to be limited to those bodies which derive their powers from legislation or the prerogative. The JAA provides that the court may grant relief "in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power".[26] The definition of a "statutory power", since an amendment passed in 1977, includes "a power or right conferred by or under...the constitution...rules or bylaws of any body corporate...".[27] "Person" is defined in section 3 to include "a body of persons whether incorporated or not...". The JAA mechanism of review is therefore potentially available in respect of self-regulatory bodies if they are incorporated. The availability of judicial review at common law does not hinge on incorporation but, as under the JAA, requires the existence of a public element.

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[24] [1985] 2 NZLR 414, 418.
[25] M Taggart, above n 23, 358-359.
[26] Judicature Amendment Act 1972, s 4.
[27] Above n 26, s 3.

Although never directly at issue, the *Datafin* principle that a private organisation exercising a public function is potentially susceptible to judicial review has been cited with approval in a number of cases. Justice Tipping in *O'Regan* v *Lousich* agreed that a public law remedy is available in respect of the exercise of a public power.[28] Justice Fisher in the High Court decision of *Peters* v *Collinge* stated that "[i]n some special situations a private body may be subject to non-contractual judicial review, for example where it exercises quasi-public functions...".[29] The same judge opined in *Waitakere City* v *Waitemata Electricity Shareholders* that "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...exercises quasi-public functions...".[30] Kelsey, it seems, was overly conservative when she observed that:[31]

> In New Zealand, the judicial climate and restrained approach to judicial review suggest the chances of any substantial broadening of its scope to the private sector - let alone of such claims being successful - are slim.

In New Zealand as in England, the availability of a contractual remedy precludes judicial review. In *Peters* v *Collinge*[32] for example, the applicant sought judicial review of the New Zealand National Party executive's decision to expel him from the political party. His application failed because it was open to him to pursue a contractual claim based on the party's constitution which was in effect a contract between its members. It seems, therefore, that judicial review of a self-regulatory body is not available to member organisations who have contractually agreed to abide by its rulings.

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[28] [1995] 2 NZLR 620, 629.
[29] [1993] 2 NZLR 554, 566.
[30] [1996] 2 NZLR 735, 747.
[31] J Kelsey *Rolling Back the State: Privatisation of Power in Aotearoa/ New Zealand* (Bridget Williams Books Ltd, Wellington, 1993) 206.
[32] Above n 29.

The Court of Appeal in its recent decision of *The Electoral Commission* v *Cameron* stated in obiter that the decisions of the Advertising Standards Complaints Board, a self-regulatory body, are amenable to judicial review under the JAA.[33]

(a) The facts

The Advertising Standards Complaints Board is constituted under the rules of the Advertising Standards Authority ("the Society"), which is an incorporated society. The Society is made up of representative groups of the advertising industry including newspaper and magazine publishers, radio and television service operators and advertising agents. It appoints four advertising industry representatives and four members (including the chairman) from outside the industry to the Board. The Board rules on complaints by reference to a code of advertising practice which the Society formulated after wide consultation with interest groups and relevant government officials. The Board may rule that a particular advertisement not be published or that publication cease as the case may be. The court acknowledged that members of the Society may not be legally bound to comply with the Board's rulings, but attached much importance to the fact that they have to date always complied as a matter of industry practice.

The Electoral Commission is a statutory body which has the promotion of public awareness of electoral matters as one of its primary responsibilities. In preparation for the first MMP election, the Commission arranged to have an advertisement published which included the statement "The more party votes a party gets, the more seats it gets in Parliament". A second advertisement contained a similar statement. A Mr Balani, a member of the Voters' Organisation for Tactical Education, complained to the Board on the basis that the statements in the

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[33] *The Electoral Commission* v *Cameron* Unreported, 16 April 1997, Court of Appeal, CA 232/96, 12. Although made in the context of a judicial review application, the statement was obiter because the court dealt with the issues before it on the basis of the Declaratory Judgments Act 1908.

advertisements were inaccurate. The advertisements failed to acknowledge that more votes would not necessarily translate to more seats in every case. The Board found that the advertisements were in breach of the "Truthful Presentation" rule in the Advertising Code of Ethics. The advertisements were withdrawn as a result. The Commission did not seek to exercise its right to appeal the Board's decision to the Appeal Board.

The Commission applied for an interim declaration suspending the Board's decision. In its original statement of claim, it alleged that the Board had acted illegally and unreasonably in fettering the legal right and duty of the Commission to promote public awareness of electoral matters. The Commission later amended this statement of claim and withdrew the application for an interim declaration. The case proceeded as an application by the Commission for judicial review to clarify whether, in the exercise of its function of promoting public awareness of electoral matters, its advertising is to be subject to the regulatory jurisdiction of the Board. The Commission sought an order prohibiting the Board and the Society from exercising any authority in relation to its public education activities.

(b) The judgment

The parties to the proceedings, the Board, the Society, the Newspaper Publishers Association and the Electoral Commission, all agreed that the decisions of the Board were in principle amenable to judicial review. The Solicitor-General argued that by imposing (at least in a de facto sense) collective standard-setting upon advertisers, essentially across all major media groups, the Society and the Board were exercising a public power. This broad regulatory regime with coercive effect, derived from collective practice should, it was submitted, be regarded no differently from that of the Take-Over Panel. This body was held by the English Court of Appeal to be exercising public powers and to therefore be amenable to judicial review in the *Datafin* case.

The court agreed that the Board was subject to review, but arrived at this conclusion after a rather confused analysis. It dismissed the value of drawing an

analogy between the collective regulatory power of the Board and that wielded by the Take-Over Panel in *Datafin*. "A more direct route available in New Zealand is to be found in the Judicature Amendment Act 1972"[34] according to the court. This was a curious comment considering that satisfaction of the elements of section 4 of the JAA is insufficient to confer a judicial review jurisdiction in the absence of a public element. However the court addressed the public nature of the Board's functions in other parts of the judgment. It was clear that the court did in fact consider the Board to be exercising a public function, and that this was a prerequisite for the application of public law principles. The basis of the court's finding that the Board exercises public power was not expressly articulated. Presumably it was based on its observation that "the Board exercises a regulatory function by which it determines what advertising is or is not communicated to the public by substantially the whole of the media throughout the country".[35] The public quality attributed to the Board's power seems to have been based on the pervasiveness of its influence. The public nature of the Board's role, according to the court, was confirmed by the statutory recognition of its regulatory role. This statutory recognition appears in section 8 of the Broadcasting Act 1989, which demarcates the jurisdiction of the Board and the statutory Broadcasting Standards Authority in respect of advertising programmes.[36] It is clear from the judgment, however, that the court would probably have found that the Board fulfilled a public role even without such statutory recognition.[37]

Although the case fell within the court's judicial review jurisdiction under section 4 of the JAA, it resolved the case with a declaration under the Declaratory Judgments Act 1908 without resort to judicial review.

Under the code, the jurisdiction of the Board is to be exercised in relation to

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[34] Above n 33, 12.
[35] Above n 33, 3.
[36] Broadcasting Act 1989, s 8(2) provides that the Broadcasting Standards Authority has jurisdiction only where neither the broadcaster nor the advertiser recognises the jurisdiction of the Board in relation to a particular complaint regarding an advertising programme.
[37] Above n 33, 3.

advertising. The term "advertising" was defined by the code to encompass the promotion of the interests of any person, product or service.[38] The Board's jurisdiction was clearly limited to commercial advertising aimed at consumers. Since the Commission does not engage in this type of promotion when it undertakes public education it therefore fell outside the ambit of the Board's jurisdiction. The court declared that, as a matter of interpretation of the advertising code, the Board did not have jurisdiction to rule on the Commission's public education advertisements.

It is interesting to note that the court did not adopt the restrictive governmental interest or "but for" tests of amenability to judicial review favoured by the English courts. It took a broader, if unarticulated, view of what constitutes a public element for the purpose of establishing whether a particular body is subject to administrative law principles. The court noted that it would be anomalous to deny judicial review in respect of the Board considering that it is constituted under a judicially reviewable entity, the Society. This was framed merely as an observation. Although the court could have justified its position that the Board is subject to review on the basis that it is an integral part of a system of government control, or that the government would step in to regulate advertising standards and complaints adjudication "but for" the existence of the Board, it steered clear of these tests.

IV SHOULD SELF-REGULATORY BODIES BE JUDICIALLY REVIEWABLE?

This part of this paper shows that the alternative mechanisms by which self-regulatory bodies can be held accountable are inadequate. It deals with whether judicial review is an appropriate means of filling this accountability vacuum. This is assessed in terms of the theoretical and practical implications of extending the

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[38] The definition of "advertising" provided in the code has since been broadened to include the provision of information for public education.

scope of the judiciary's supervisory jurisdiction in this way.

A Alternative Mechanisms of Accountability

1 Public law principles

Self-regulatory bodies may be subject to public law principles in an ostensibly private action. *Finnigan* v *New Zealand Rugby Football Union*[39] is an example of a case in which the court examined a private body's decision-making process against the principles of good administration outside the context of judicial review proceedings. Sir Gordon Borrie has referred to this case as an example of the judiciary's private law supervisory or "longstop" jurisdiction.[40] In *Finnigan*, the Union's decision to accept an invitation for an All Black team to tour South Africa was challenged on the basis of invalidity and illegality. Justice Cooke held that the Union had deliberately shut its eyes to public concern over the South African tour. In so doing, the court essentially imposed upon the Union the requirement to have regard to relevant considerations in its decision-making. Among the reasons which the court gave for applying public law standards to the private entity was the fact that the Union was making a decision of major national importance. Presumably the courts might also expect a self-regulatory body making a decision with important implications for the public to observe the principles of good administration.

The principles of natural justice, which form the basis of one of the grounds of judicial review, have been applied to entities such as professional bodies and club committees outside the context of judicial review proceedings.[41] Self-regulatory bodies could be subject to the rules of natural justice even if they were considered not to be judicially reviewable.

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[39] [1985] 2 NZLR 159.
[40] Sir G Borrie "The Regulation of Public and Private Power" [1989] Public Law 552, 563.
[41] *Ridge* v *Baldwin* [1964] AC 40, 47.

2 *Abuse of dominant position as a monopoly*

Taggart claims that the doctrine that monopoly suppliers of essential goods must supply at a reasonable price is well established as part of New Zealand law.[42] The Court of Appeal in *Auckland Electric Power Board* v *Electricity Corporation of New Zealand* commented favourably on the availability of a common law action against a monopoly supplier for refusing to supply at fair and reasonable prices.[43] The Privy Council hedged its comments about the availability of such an action in rather less certain terms in the appeal decision of *Mercury Energy Ltd* v *Electricity Corporation of New Zealand Ltd*.[44] If such an action does in fact exist in New Zealand, this may provide a mechanism for making self-regulatory bodies accountable for the way in which they exercise their powers.

The common law duty not to abuse a monopoly position is traditionally concerned with the reasonableness of the charge for the use of property or the provision of related services. Forsyth however, queries why this duty should not apply to those who exercise monopoly power in general.[45] Self-regulatory bodies could be said to exert monopoly power when they exercise discretionary power conferred upon them by contract or consent, particularly when exercised in such a way as to affect third parties. Forsyth proposes that the common law could impose upon such bodies a requirement to act reasonably and in accordance with the rules of natural justice.[46] The development of such an action could have the effect of subjecting self-regulatory bodies to the same standards of decision-making as those applied in judicial review. Forsyth describes this recognition of the common law's ability to control monopoly power as a basis for extending the scope of judicial review to these bodies.

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[42] M Taggart, above n 23, 362.
[43] [1994] 1 NZLR 551, 557.
[44] Above n 22, 391.
[45] C Forsyth "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 Cambridge Law Journal 122, 125.
[46] Above n 45, 125.

3 *Competition Law*

Like all private entities, self-regulatory bodies are subject to competition law. Section 27(1) of the Commerce Act 1986 provides:

> No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has the likely effect, of substantially lessening competition in a market.

Section 36 of the Commerce Act 1986 provides:

> No person who has a dominant position in a market shall use that position for the purpose of-
>
> (a) Restricting the entry of any person into that or any other market; or
>
> (b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
>
> (c) Eliminating any person from that or in any other market.

These sections could be invoked in relation to self-regulatory bodies in some instances. The Ministry of Consumer Affairs in its policy paper on self-regulation and codes of practice recognised that industries may use self-regulatory schemes as a means of restricting competition by limiting entry to participation in the scheme or setting unnecessarily high minimum standards of trading conduct.[47] As a further example of how a self-regulatory body might contravene the above competition law provisions, the Advertising Standards Complaints Board may be said to prevent a person from engaging in competitive conduct by upholding an unfounded complaint about that person's advertisement and preventing it from being published in future. The Court of Appeal in *Cameron* noted that the Commerce Commission had in fact considered the collective activities of the Board on competition law grounds and raised no objection. The court presumed that this

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[47] Above n 2, 8.

was because the Society and the Board are regarded as operating in the public interest.[48] Under section 35 of the Commerce Act 1986, the Commerce Commission may authorise a code which infringes the above competition provisions if it is satisfied that the code will result in a benefit to the public which will outweigh any restrictive effect on competition.

The Commerce Commission's power to control the unreasonable exercise of power is limited to those situations where competition is thereby inhibited or the public is mislead or deceived. Competition law therefore has only limited value as a mechanism of accountability in relation to self-regulatory bodies.[49]

4 *Contract Law*

Members of self-regulatory bodies are often in contractual relationships with each other and with the body itself. They are contractually bound to submit to the body's jurisdiction. It would be inconsistent with the freedom of contract to deny that such an agreement is legally binding. However there cannot be an absolute obligation to submit to the body's discretionary exercise of power. The courts, in some cases, perform private law supervision by implying terms such as natural justice[50] and fairness into contracts.[51] These standards reflect some of the principles of good administration which are applied in judicial review.[52]

Similarly, the contract between the participating banks and the Banking Ombudsman could be said to contain an implied term that the Banking

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[48] Above n 33, 3.

[49] Taggart recognised the limited extent to which competition law may be invoked to control the unreasonable exercise of private power in M Taggart "Corporatisation, Privatisation and Public Law" (1991) 2 Public Law Review 77, 96.

[50] There may be an express term that the rules of natural justice will be observed in the complaints handling and enforcement procedures of a self-regulatory body, as recommended by the Ministry of Consumer Affairs. See Ministry of Consumer Affairs, above n 5, 11-12.

[51] See for example *Marlborough Harbour Board* v *Goulden* [1985] 2 NZLR 378, 383; above n 29, 566.

[52] D Oliver "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] Public Law 543, 558-560; M Taggart "The Impact of Corporatisation and Privatisation on Administrative Law" (1992) 51 Australian Journal of Public Administration 368, 369.

Ombudsman would exercise her powers reasonably. The parties could surely not have intended otherwise. The courts would allow the Ombudsman a high degree of discretion in determining whether a particular decision was made reasonably, given her expertise in handling banking complaints. The courts' inquiry would then closely resemble that engaged in under the irrationality or *Wednesbury* unreasonableness head of judicial review.

A member of a self-regulatory body may bring an action in respect of a breach of an express term in its contract with the body. For example, clause 16 of the Banking Ombudsman's Terms of Reference provides that:[53]

> In making any recommendation or award under these Terms of Reference the Banking Ombudsman shall...have regard to the general principles of good banking practice and any relevant code of practice applicable to the subject matter of the complaint.

If the Banking Ombudsman were to make an award against a participating bank in respect of a complaint without referring to the Code of Banking Practice, in a situation where this code is relevant, the participating bank could presumably bring an action against the Ombudsman for breach of contract. The Banking Ombudsman would not have exercised her discretionary power in accordance with her contractual obligations. To determine whether the Ombudsman breached the contractual term in such a scenario, the court would need to engage in an inquiry which would mirror judicial review. The "relevant code of practice" referred to in clause 16 above is the equivalent of a statutorily prescribed mandatory relevant consideration. The inquiry into whether this was considered would be the same, whether to establish breach of contract or illegality in the public law sense. These example illustrate Cane's contention that the differences between public law and contractual controls on the exercise of discretionary power are very unclear.[54]

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[53] Office of the Banking Ombudsman *The Banking Ombudsman: Terms of Reference* (Wellington, 1996) 8.
[54] Above n 21, 339.

The utility of contract law as an alternative to judicial review as a means of providing redress for the unjust exercise of discretionary power by self-regulatory bodies is very limited. The doctrine of privity of contract makes contractual claims unavailable to third parties to a contract. The Electoral Commission in *Cameron* could not have relied on a claim in contract to seek redress against the Advertising Standards Complaints Board, for example, because it was not in a contractual relationship with the Board.

B Theoretical Basis of Judicial Review

Whether self-regulatory bodies should be subject to judicial review depends, in part, on whether this extension of the courts' supervisory jurisdiction would be consistent with its theoretical underpinnings. An ad hoc extension of the scope of judicial review to these bodies could be challenged as unconstitutional and illegitimate. This section outlines the development of the traditional scope of judicial review. The relevance of the ultra vires conception of judicial review is dismissed and an alternative theory of the basis of the judicial review jurisdiction is postulated. The role of the judiciary in defining the scope of its review jurisdiction is examined. The last point dealt with in this section is the conceptual coherence of subjecting self-regulatory bodies to judicial review.

1 Development of judicial review

The origins of judicial review are complex. Early judicial review was principally a mechanism by which the Kings Bench exerted its dominance over inferior tribunals. It provided a means of remedying unjust or illegal treatment by these tribunals. The nineteenth century saw a gradual transformation in the rationale for judicial review. The exercise of judicial power came to be expressed as a means of enforcing the will of a representative legislature. The ultra vires principle was developed as the doctrinal justification for judicial intervention into the exercise

of power delegated to government agencies by Parliament.[55]

More recently, the predominant concern of judicial review has been to protect the citizenry from the excesses of executive power. The courts have developed the principles of this branch of administrative law largely since World War II. This has been in response to the expansion in the Crown's activities since that period and the decreasing ability of Parliament to control the executive branch of government.[56] Some might say that the scope of judicial review should therefore now be shrinking as the state retreats.[57]

The courts maintain that judicial review is a jurisdictional inquiry, not an appeal or a rehearing. This is reflected in the standards applied in judicial review, which have come to be known as "the principles of good administration". These rules constitute the grounds upon which specific acts and decisions may be challenged in judicial review proceedings. They include illegality, irrationality (also known as *Wednesbury* unreasonableness), breach of natural justice and various emerging grounds of review. These grounds ostensibly relate to the integrity of the decision-making process, rather than to the correctness of the decision itself. Critics suggest that the judicial inquiry is in fact becoming increasingly concerned with the substance of decisions and that this is inappropriate.[58]

2 *Basis of judicial review jurisdiction*

(a) Ultra Vires

The orthodox conceptual basis of judicial review is ultra vires. Oliver defines this doctrine in terms of its two limbs. First, it means that a public authority may only

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[55] PP Craig *Administrative Law* (3 ed, Sweet & Maxwell, London, 1994) 5-6.

[56] G Taylor, above n 23, 4; AR Galbraith "Deregulation, Privatisation and Corporatisation of Crown Activity: How will the Law Respond?" (New Zealand Law Conference: The Law and Politics, Wellington, March 1993) 226, 227.

[57] Sir Ivor Richardson, in Taggart's opinion, subscribes to this point of view. See M Taggart, above n 23, 360-361.

[58] See for example M Poole "Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" [1995] New Zealand Law Review 426.

act within the legal powers directly or indirectly delegated to it by Parliament. Conversely, it is compelled to act where Parliament has charged it with a legal responsibility to do so. Public authorities must exercise their powers in accordance with the principles of good administration in order to comply with the second limb of the doctrine.[59] Parliament is presumed to intend these restraints on the exercise of power by public authorities and further, is presumed to intend the courts to exercise the supervisory jurisdiction of judicial review in relation to the exercise of such power.[60] According to the traditional view, the legitimacy of the courts' supervisory jurisdiction rests on the doctrine of ultra vires since there is otherwise no constitutional basis for the courts to interfere with the exercise of statutory power.

Judicial review of self-regulatory bodies is unjustified under the ultra vires conception of the courts' supervisory jurisdiction. Since the codes of practice according to which these entities operate have not been generated or even sanctioned by Parliament, it cannot be said that Parliament has expressed any intention in relation to how the discretionary powers they confer should be exercised. The courts cannot cite Parliament's intention as a basis for their supervisory jurisdiction in relation to self-regulatory bodies. However, this difficulty is not fatal to the legitimacy of judicial review of self-regulatory bodies. Although Sir William Wade describes the ultra vires doctrine as the "central principle of administrative law",[61] many other commentators have rejected this conception of the theoretical basis of judicial review as artificial.[62] For example, it does not explain the extension of the courts' supervisory jurisdiction to the exercise of prerogative power[63] in *Council of Civil Service Unions*.[64] If the source of power being reviewed is non-statutory, then Parliament has not

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[59] D Oliver, above n 52, 544.
[60] Sir W Wade and C Forsyth *Administrative Law* (7 ed, Clarendon Press, Oxford, 1994) 43.
[61] Above n 60, 41.
[62] See for example D Oliver, above n 52; Lord Woolf "Droit Public - English Style" [1995] Public Law 57, 65-66; above n 45, 122.
[63] D Oliver, above n 52, 546; above n 45, 123; S De Smith, H Woolf and J Jowell *Judicial Review of Administrative Action* (5 ed, Sweet & Maxwell, London, 1995) 250-251.
[64] Above n 11.

expressed any intention in relation to how it should be exercised and the ultra vires principle fails to justify judicial intervention.

Sir William himself has betrayed his loyalty to the ultra vires basis of judicial review in proposing that judicial review ought to lie against a private body where livelihood or property are at stake.[65] It is difficult to see how Sir William could justify judicial review of private entities considering his view of the ultra vires doctrine as the central principle of administrative law.

(b) Protect individuals

What is the basis of the judiciary's judicial review powers if it is not ultra vires? Joseph has observed that courts are claiming a general power to remedy injustices rather than indulging in jurisdictional terminology.[66] Oliver suggests that the legitimacy of judicial review now rests on a concern for the protection of individuals. Judicial review is inherently legitimate since it is a means of controlling power and it is necessary to control the exercise of power in order to protect individuals.[67] Sir Harry Woolf (as he then was) has taken a similar position, suggesting that "a body should be subject to judicial review if it exercises authority over another person or body in such a manner as to cause material prejudice to that person or body...".[68] Taylor suggests that those bodies with "the practical power to determine or affect the rights, broadly speaking, of persons who have not voluntarily consented to that..." be subject to review.[69]

The notion that judicial review is legitimate because it protects individuals from the abuse of power is extremely broad. It does not explain why the courts should apply administrative law standards, as opposed to principles of private law, to a particular discretionary exercise of power. The hypothesis assumes that judicial

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[65] Sir W Wade "New Horizons in Administrative Law" (9th Commonwealth Law Conference, Auckland, April 1990) 437, 441.
[66] P Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Co, Sydney, 1993) 661-662.
[67] D Oliver, above n 52, 543.
[68] Sir H Woolf "Judicial Review: A Possible Programme for Reform" [1992] Public Law 221, 235.
[69] G Taylor, above n 23, 16.

review is concerned principally with providing a means of redress for individuals who have been aggrieved by the unjust exercise of power. It fails to address the equally important role of modern judicial review, which is to improve the quality of administrative decision-making.[70]

(c) Uphold public expectations

There is a growing expectation that those who wield power in society should be accountable[71] and subject to the principles of "liberty, fair dealing and good administration".[72] While this trend could be used to justify an expansion in the scope of judicial review, it does not provide a clear basis on which to define its limits. Public expectation is too vague a concept to explain why some forms of power should be subject to private law standards of behaviour and other forms should be controlled by the more onerous public law principles.

Public expectations of accountability in relation to particular organisations probably depend more on the power of the organisation to affect their interests than on the source of the power. This points in favour of a functional rather than source-based approach to defining the scope of judicial review.

(d) Control market power

Taggart believes the appropriate scope of judicial review to include the exercise of significant market power by privatised enterprises and private corporations.[73] Oliver[74] and Sir Gordon Borrie[75] share this view. This proposed extension of the scope of judicial review is not based on constitutionally sound principles. The ad hoc imposition of public law standards on decision-makers simply on the basis

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[70] GDS Taylor "May Judicial Review become a Backwater?" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 153, 177.
[71] M Chen "Judicial Review of State-Owned Enterprises at the Cross-Roads" (1994) 24 Victoria University of Wellington Law Review 51, 68; M Chen "The Reconfiguration of the State and the Appropriate Scope of Judicial Review" in J Boston (ed) *The State under Contract* (Bridget Williams Books Ltd, Wellington, 1995) 121.
[72] Above n 40, 558-559.
[73] M Taggart, above n 52, 371.
[74] D Oliver, above n 52, 566.
[75] Above n 40, 554.

that they wield significant power in the market is unjustified. If a large corporation decides to source its raw materials from an alternative supplier, thereby causing the existing supplier to go out of business, it would be absurd to suggest that the aggrieved supplier could challenge the decision in judicial review proceedings on the basis that it was made irrationally for example. This degree of judicial interference would stifle the flexibility which market players must have to operate successfully in a competitive commercial environment. The certainty required to promote commercial activity would be undermined by judicial review or even by the threat of such review. It would pose too great a restriction on the individual liberties of the private entities. Their participation in the market could be discouraged by onerous standards of decision-making. The public interest would not be served by making private entities subject to judicial review simply on the basis that they exercise significant power in the market.

(e) Control exercise of public power

A number of commentators agree that the susceptibility of an entity to judicial review should be determined on the basis of the nature of the function it performs.[76] The use of the public function test as an indicator of the applicability of public law standards and sanctions is seen in the New Zealand Bill of Rights Act 1990 ("the NZBORA"). Section 3(b) makes the rights and freedoms contained in the Act applicable to acts done "[b]y any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body pursuant to law". This test recognises that bodies which exercise public functions should be subject to public law standards and sanctions to secure the public interest, irrespective of whether these bodies are public or private.

Commentators who believe that the performance of a public function should be subject to judicial review implicitly reject the notion that judicial review is limited to the control of power derived from a particular source. However, their conceptions of the type of function which should render a body subject to judicial

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[76] G Taylor and J Timmins "Administrative Law - The Changed Role of the Government" (New Zealand Law Society Seminar, Wellington, August 1989) 1, 25; J Black, above n 10, 43.

review are many and varied. A public function or element is said to be required, but what is the meaning of "public"? Tompkins' suggestion that the word in this context simply means "affecting subjects"[77] is too broad to provide a sound basis upon which to apply public law principles. Many large corporations, for example, have the power to affect a significant portion of the general public. Holding these entities to public law standards of decision-making is undesirable, as previously explained.

It is proposed in this paper that public power is that which is purportedly exercised in the "public interest", and that this is the key to the theoretical basis of judicial review.[78] The courts' power to judicially review governmental bodies arises not from the ultra vires doctrine, but from the fact that these entities exist to serve the public interest. Bodies purporting to serve the best interests of the pubic should be held to higher standards of decision-making than those operating to maximise their own benefits. The public has an interest in holding these entities to particularly high standards of decision-making. The law need not be so concerned with respecting the individual liberties of bodies who are self-professedly operating in the public interest. This proposed justification for judicial imposition of the principles of good administration provides a coherent basis on which to extend the scope of judicial review beyond executive power to power wielded by private entities, including self-regulatory bodies.

In the heavily regulated economy which characterised the period between World War II and the 1980s, the only entities which operated in the public interest were governmental in nature. In the deregulated economic and social climate of the past decade, we have seen public interest as a primary focus in private entities such as

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[77] AIM Tompkins "Judicial Review and the Public Domain" [1987] New Zealand Law Journal 120, 122.

[78] See J Fogarty "Legal Accountability of Government in all its Guises: Where to After Mercury?" in J Fogarty and E Wylie (eds) *Hot Topics in Administrative and Public Law* New Zealand Law Society Seminar, Wellington, May 1995, 1; S de Smith, H Woolf and J Jowell, above n 63, 167-168.

State-Owned Enterprises[79] ("SOEs") as well as in self-regulatory bodies. Indeed, the Privy Council in *Mercury Energy Ltd* gave the fact that SOEs operate in the public interest as one of the reasons for holding them to be amenable to judicial review.[80] Public interest decision-making has moved into the private sector. The courts should recognise this and extend the scope of judicial review accordingly.

(f) New Zealand Bill of Rights Act 1990

A statutory imperative to subject self-regulatory bodies to judicial review would provide a constitutionally sound basis for extending the judiciary's review jurisdiction to these bodies. The NZBORA provides that judicial review is available in respect of some entities. However, whether self-regulatory bodies are among these entities is debatable.

Section 3(b) of the NZBORA provides that its rights and freedoms apply to acts done "[b]y any person or body in the performance of any public function, power or duty conferred or imposed on the person or body by or pursuant to law". Whether self-regulatory bodies fall within section 3(b) depends on whether the courts consider these bodies to perform a "public function" and whether the power to perform this function is conferred by law. NZBORA jurisprudence as it has developed to date indicates that the courts will take a generous and purposive approach to the interpretation of section 3(b).[81]

The courts have not yet had to decide whether self-regulatory bodies perform a public function for the purposes of the NZBORA. Justice McGechan in the High Court decision of *Federated Farmers of New Zealand (Inc)* v *New Zealand Post Ltd* attached some importance to the fact that New Zealand Post's power to exercise its mail handling function was originally conferred by statute in holding

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[79] SOEs are private in the sense that they are incorporated under the Companies Act 1993. The powers they exercise derive from this general legislation, not from specific empowering statutes. Of course they are public bodies in the sense that they are owned by the public.

[80] Above n 22, 388.

[81] *Noort* v *Ministry of Transport*; *Curran* v *Police* (1990-92) 1 NZBORR 97, 163 (per Hardie Boys J).

that it was a public function for the purpose of section 3(b). The other relevant factors were that New Zealand Post, although an incorporated company, is ultimately owned and controlled by the Crown, and that mail handling is carried out in the public interest.[82] The fact that self-regulatory bodies operate (or at least purport to operate) in the public interest is the only one of these factors which applies to these entities. A court may be persuaded to hold that they perform a public function for the purposes of section 3(b) by the fact that the function of self-regulatory bodies would, in some cases, be performed by statutory bodies but for their existence.

Some commentators, including Taggart, take the view that "law" does not refer exclusively to statute law and includes common law.[83] A self-regulatory body's exercise of power derived from the common law of contract may therefore be subject to the rights and freedoms contained in the NZBORA.

Section 27(2) of the NZBORA provides that:

> Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

An applicant seeking judicial review on the basis of this section would need to show that the self-regulatory body in question is a public authority. Whether this would automatically follow from a finding that the body performs a public function, which is a prerequisite for the applicability of the NZBORA to a private entity, is unclear. Chen takes the view that public authorities are *arguably* subsets of the bodies included in section 3(b) of the NZBORA.[84] According to the White Paper on the NZBORA, the meanings of "public authority" and "determination"

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[82] (1992) 3 NZBORR 339, 394.
[83] M Taggart, above n 23, 362; P Radich and R Best "Section 3 of the Bill of Rights" [1997] New Zealand Law Journal 251, 255.
[84] M Chen, 1994, above n 71, 84.

were deliberately left vague.[85] (There is no relevant case law deriving from the Canadian Charter since it does not include an equivalent to section 27(2).) The onus was intentionally put onto the courts to define these terms and thereby draw the line as to which bodies and which types of decisions should be subject to judicial review.

It seems clear that whether the NZBORA confers a right on an individual aggrieved by the decision of a self-regulatory body to bring judicial review proceedings against that body would depend on the existence of a public element.[86] The court would therefore need to engage in the same inquiry as that required to determine the availability of judicial review at common law or under the JAA. As Radich and Best point out, the respective scopes of judicial review and the NZBORA probably coincide to a great extent.[87] The NZBORA does not, therefore, provide an alternative basis on which to justify judicial review of self-regulatory bodies.

3 Judiciary's role in defining the scope of judicial review

As explained in part III B 1 above, the scope of judicial review is not prescribed by the JAA. This Act is merely a procedural tool to streamline judicial review applications. As a creature of the common law the scope of judicial review is entirely at the discretion of the judiciary,[88] at least in the absence of legislative intervention. The judiciary's power to define the scope of judicial review is therefore unencumbered by the statutory wording of the JAA.

The legitimacy of judicial review depends ultimately on public confidence.[89] One conception of the courts' role is that it should translate the public's expectations

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[85] A Bill of Rights for New Zealand: A White Paper (Government Printer, Wellington, 1985) 110.
[86] The White Paper was clear that the proposed Bill of Rights was not intended to apply to private action. Above n 85, 71.
[87] P Radich and R Best, above n 83, 255.
[88] *Burt* v *Governor-General* [1992] 3 NZLR 673, 683.
[89] Sir G Brennan "The Purpose and Scope of Judicial Review" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 18; AR Galbraith, above n 56, 227.

into legal principles in order to maintain this confidence. This has been expressed by Thomas J as "judicial autonomy", which he defines as:[90]

> ...the process by which a judge translates the standards, needs and expectations of the community into legal principles, and it incorporates the freedom, independence, and capacity for judges to consciously undertake that task.

He argues that a duty to exercise this autonomy arises because the law exists "to serve the community and meet the function which society has ascribed to it".[91] Taylor agrees that the principles of judicial review are based on a judicial assessment of what society requires. The courts mould their jurisdiction according to the will of the public.[92] It would be far-fetched to suggest that the courts could elucidate the prevailing public expectation in relation to which types of entities should be held to public law as opposed to private law standards of behaviour. The public's expectation of accountability could motivate the judiciary to expand the scope of judicial review. It could not, however, define the appropriate scope of the judiciary's public law supervisory jurisdiction. The courts must take a more active role in circumscribing the scope of review than merely translating public sentiment into legal principles.

Sir Ivor Richardson believes that the courts must be continually alert to the changing context of the law in society:[93]

> [T]he values underlying particular legal principles need to be continually reassessed, modified, and in some cases replaced, to reflect contemporary thinking. This need to re-examine is particularly true where society has gone through or is going through a marked change. And to function effectively courts cannot afford to be too far ahead or too far behind in their thinking.

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[90] Justice EW Thomas "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 Victoria University of Wellington Law Review 1, 2.
[91] Above n 90, 2.
[92] G Taylor, above n 23, 3.
[93] Above n 4, 64.

It is the courts' role to continually reassess the basis of judicial review and the extent of its legitimate scope. It is incumbent on the courts to identify the types of power which should be subject to its judicial review oversight. The courts should clearly articulate the basis upon which particular powers are subjected to public law principles.

4 Conceptual coherence

Sir William Wade believes that the application of judicial review to a self-regulatory body's code of practice has curious constitutional consequences. In conducting judicial review of a self-regulatory body's acts and decisions, the courts, according to Sir William, would be treating the code as a form of legislation. Sir William perceives there to be a constitutional difficulty here in that this "legislation" has been generated independently of Parliament.[94] It is difficult to see the relevance of this theoretical argument since the application of judicial review to self-regulatory bodies does not threaten parliamentary sovereignty. Sir William, it seems, subscribes to the unitary vision of democracy, where all public power is legitimated by MPs in Parliament. Subjecting private entities to judicial review is not conceptually incoherent under the pluralist democratic model, under which power can be legitimated in other ways. The Diceyan notion that all public power must be channelled through Parliament is no longer appropriate considering the many and diverse concentrations of power in modern society.

Sir William also points to the absurdity of suggesting that a decision of a self-regulatory body could be quashed. Quashing normally renders a decision without legal effect, but the decision of a self-regulatory body is of no legal effect in any case. Sir William concludes that it would therefore be meaningless to quash such a decision.[95] Again, this can be dismissed as a purely semantic argument. Quashing a decision of a private body would have a symbolic value and, in some

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[94] Above n 65, 439. See also PV Baker "New Vistas of Judicial Review" (1987) 103 The Law Quarterly Review 323, 326.
[95] Above n 65, 437.

cases, a practical effect. It would not, contrary to Sir William's contention, be meaningless.

C *The Distinction between Public and Private Law*

It would be undesirable to make particular entities subject to public law principles on an ad hoc basis. This would introduce uncertainty and would undermine the legitimacy of judicial review. Making self-regulatory bodies susceptible to judicial review could be said to blur the notional boundary between public and private law, since a private body would be subjected to public law standards of good administration and could be exposed to public law sanctions. This concern would be valid if the source of power were the determinant of whether public or private law should apply. However, it has already been proposed that the essence of the distinction between public and private law is that public law applies to power which is exercised, or is purported to be exercised, in the public interest. Since self-regulatory bodies by their nature operate in the public interest, they may be subjected to judicial review without compromising the distinction between public and private law.

Lord Cooke has played down the significance of the distinction between public and private law in a number of contexts. In *Finnigan* Cooke J (as he then was) described the situation as falling "into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn".[96] In another instance, he described it as strained to treat public and private law as separate systems in New Zealand. He considered that the 1977 amendment to the JAA including powers conferred under the constitution of a body corporate in the range of powers which could be reviewed blurred the boundary between the two systems.[97] Sir William Wade has referred to the distinction

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[96] Above n 39, 179.

[97] Sir R Cooke "The Struggle for Simplicity" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, Auckland, 1986) 1, 3.

between public and private law as misguided.[98]

Lord Woolf, contrary to Lord Cooke and Sir William, maintains that the distinction between public and private law remains an important one. He claims that the imposition of the higher standards of decision-making imposed by public compared to private law is justified in relation to bodies operating in the public interest. However, the standards of good administration are too onerous to impose on private entities who operate, as they are entitled to, in their own best interests.[99] Subjecting private bodies exercising a public function to public law standards does not compromise the distinction between public and private law. Rather, it recognises that public power may be exercised privately.

D Effects of Extending Judicial Review to Self-Regulatory Bodies

1 Floodgates

Some critics of an expanded scope of judicial review cite a floodgates argument, predicting that the courts would be overwhelmed with applications for review.[100] This is not a legitimate basis on which to determine the scope of judicial review. If it were, the Executive could manipulate the scope of the judiciary's supervisory jurisdiction by neglecting to fill judicial vacancies.[101] Restricting the scope of judicial review to avoid flooding the courts with applications wrongly elevates the scarcity of resources to a legal principle.[102] Pannick agrees that the courts should not be tempted to place fetters on their jurisdiction by the lack of judicial resources.[103]

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[98] Above n 60, 667.
[99] Lord Woolf, above n 62, 61.
[100] J Black, above n 10, 31.
[101] S de Smith, H Woolf and J Jowell, above n 63, 172.
[102] E Barendt, A Barron, J Herberg and J Jowell "Annual Review - Public Law" (1993) 46 Current Legal Problems 103, 116.
[103] D Pannick "Who is Subject to Judicial Review and in Respect of What?" [1992] Public Law 1, 7.

The floodgates argument is also undermined by the mechanisms of controlling unmeritorious claims which the courts have at their disposal. Judicial review can be denied if the court considers that the subject-matter is not suitable for judicial consideration, or is non-justiciable.[104] The discretionary nature of the public law remedies provides the courts with an important control mechanism.[105]

2 *Uncertainty*

Sir William Wade has expressed concern about the uncertainty which might result from enlarging the scope of judicial review:[106]

> I cannot help feeling that administrative law should be about law, and should confine itself to powers and duties which are genuinely based on statutory or other legal foundations. Once the courts go beyond what is genuinely law, what guidelines will there be for them - and for the citizen who needs to know where he stands?

A broadening in the scope of judicial review can only introduce uncertainty as to its limits if it is broadened on an unarticulated and ad hoc basis. This, arguably, is the situation at present. The notion of a "public function" is insufficiently defined to clearly circumscribe the scope of review in relation to private entities. Legal certainty can, however, be improved if the courts devise a coherent basis for the scope of judicial review and clearly articulate this when determining whether to subject a particular entity to public law principles. The public interest test would circumscribe the scope of judicial review quite clearly. Sir William's assumption that an enlarged scope of judicial review is inherently uncertain is flawed.

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[104] G Taylor, above n 23, 18.
[105] G Taylor, above n 23, 52.
[106] Above n 65, 440.

3 *Frustrate advantages of self-regulation*

Sir William Wade has claimed that judicial review of self-regulatory bodies frustrates the advantages of self-regulation by introducing legal arguments and contests and associated formality, hostility, delay and expense.[107] The English Insurance Ombudsman has similar concerns about the impact of judicial review. He is said to have expressed relief after the *Aegon Life Assurance Ltd* decision, in which his acts and decisions were held not to be subject to judicial review. He believed that susceptibility to judicial review would hinder the flexibility of his office and would force him to become unnecessarily formal and legalistic in its procedures.[108]

It may be argued that these concerns about the effects of judicial review are unjustified considering that these bodies need do no more than adhere to the principles of good administration to avoid having their acts and decisions successfully challenged in judicial review proceedings. The force of this argument depends on what is meant by the "principles of good administration" as applied to self-regulatory bodies. Over-zealous application of public law principles would undoubtedly frustrate some of the advantages of self-regulation. A strict application of the judicial review ground of illegality for example, would force self-regulatory bodies to take a legalistic approach to the interpretation of their codes of practice. This could undermine their flexibility to act according to the spirit of the code and treat each new situation according to its merits. This is further discussed in part VI below. The courts may also limit the impact of judicial review on self-regulatory bodies by exercising their discretion in relation to judicial review remedies. This is discussed in part VII below.

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[107] Above n 65, 438.

[108] PE Morris "The Insurance Ombudsman Bureau and Judicial Review" [1994] Lloyd's Maritime and Commercial Law Quarterly 358, 360.

The availability of judicial review of decisions of a self-regulatory body enhances its legitimacy in the eyes of the public.[109] Self-regulatory bodies are subject to the criticism that they are biased toward the industry in which they operate. Judicial review would help to dispel this criticism. They would be seen to be accountable, both by the public and by the member organisations.

V STANDING TO BRING ACTIONS AGAINST SELF-REGULATORY BODIES

The JAA imposes no specific requirements as to standing. The only standing requirements in relation to judicial review of self-regulatory bodies should be that the applicant's rights or interests have been affected by the act or decision of such a body. This indeed seems to be the line taken by the Court of Appeal in *Cameron* when it indicated that the Electoral Commission could conceivably bring judicial review proceedings against the Advertising Standards Complaints Board in the future. It seems that Taylor was unduly conservative in his approach to standing:[110]

> [T]he actions of a private law organisation may be challenged by members, those for whose benefit the organisation exists and those voluntarily bringing themselves within the organisation's jurisdiction. Total strangers adversely affected by the unlawful actions of [a private] organisation could bring proceedings in tort or contract as in any private law dispute - the proceedings would not have a judicial review nature.

Perhaps Taylor's approach can in fact be reconciled with the broader view of standing in relation to self-regulatory bodies since these organisations operate in

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[109] Glen Wiggs, Executive Director, Advertising Standards Complaints Board, telephone interview, 9 July 1997.
[110] G Taylor,above n 23, 14.

the public interest. Since they exist for everyone's benefit, anyone who has been aggrieved by such a body potentially has standing to bring actions against them. There are no "total strangers" to self-regulatory bodies.

While it seems clear that aggrieved third parties should have standing to bring judicial review actions against self-regulatory bodies, the question remains whether a member organisation in a contractual relationship with such a body should be allowed to initiate judicial review proceedings. There is an analogy between the issue of whether an applicant who has submitted to the jurisdiction of a self-regulatory body should have recourse to judicial review, and the issue of whether a plaintiff with a contractual claim may seek a remedy in tort. The general position is that there is no concurrent contract and tort liability. This is because recourse in tort would frustrate the parties' intention as embodied in their contract. Freedom of contract would be impinged upon to an unacceptable extent. Similarly, an aggrieved party in a contractual relationship with a self-regulatory body should not be able to seek judicial review of the body's decisions. If the parties want access to formal mechanisms of dispute resolution in relation to the exercise of contractually conferred regulatory power, then they should provide for this in their agreement. Thus the position taken in England and New Zealand that contractual submission to a self-regulatory body's jurisdiction precludes judicial review is based on sound policy considerations since parties are free to provide for arbitration or mediation should a dispute arise. In any case, the standards of decision-making imposed by the express and implied terms of contracts conferring regulatory power are not likely to be very different from those embodied in public law principles. See part IV A 4 above.

Consent to jurisdiction should not deprive an aggrieved individual of standing if the self-regulatory body holds a monopoly. The monopoly would vitiate meaningful consent to its jurisdiction and judicial review should be available in respect of its acts and decisions.

VII GROUNDS OF JUDICIAL REVIEW OF SELF-REGULATORY BODIES

A Traditional Grounds of Review

The JAA does not prescribe the grounds upon which the courts may conduct judicial review but implicitly adopts the common law grounds in section 4 which states that:

> The High Court may...by order grant...any relief that the applicant would be entitled to in any or more of the proceedings for a writ or order in the nature of mandamus, prohibition, certiorari or for a declaration or injunction against that person in any such proceedings.

Thus the traditional grounds of judicial review as articulated in the famous case of *Council of Civil Service Unions* apply in judicial review proceedings under the JAA and at common law. Lord Diplock listed them as illegality, irrationality and procedural impropriety. He left open the possibility that the list might be extended and identified proportionality as a possible ground to be developed in future.[111] A number of additional grounds including substantive unfairness[112] have emerged since this case.

B Relevance of Traditional Grounds of Review

Taylor takes the view that judicial review of private organisations would be largely on the same grounds as those applied to governmental bodies.[113] This section of this paper considers whether Taylor's opinion is supported by the case law and explores the question of whether review on this basis would be desirable.

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[111] Above n 11, 376-377.
[112] See *Thames Valley Electric Power Board* v *New Zealand Pulp and Paper Ltd* [1994] 2 NZLR 641, 652.
[113] G Taylor, above n 23, 15.

The traditional grounds of judicial review have developed in the context of the exercise of statutory powers. Some of the grounds are more readily applicable to the exercise of non-statutory powers than others. If self-regulatory bodies are to be judicially reviewable in principle, it is important to consider the grounds on which such review should be conducted.

There is already a willingness to tailor the grounds of judicial review according to the particular characteristics of the powers being reviewed. For example, the Privy Council in *Mercury Energy Ltd* significantly restricted the grounds of judicial review of commercial decisions of State-Owned Enterprises. Such decisions could only be challenged on the basis of fraud, corruption or bad faith.[114] Similarly, Wheeler has advocated a flexible approach to judicial review of prerogative power.[115]

Lord Donaldson MR expressed concern about the relevance of the traditional grounds of review to self-regulatory bodies in the English Court of Appeal decision of *R* v *Panel on Take-Overs and Mergers, ex parte Guinness Plc.* He proposed an innominate "blanket" ground of review:[116]

> It may be that the true view is that, in the context of a body whose constitution, functions and powers are sui generis, the court should review the panel's acts and omissions more in the round than might otherwise be the case, and whilst basing its decision on familiar concepts, should eschew any formal categorisation...[T]he ultimate question would, as always, be whether something has gone wrong of a nature and degree which required the intervention of the court...

Lord Woolf, in the same case, also advocated this very broad ground of judicial review of the Panel, explaining that:[117]

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[114] Above n 22, 391.
[115] F Wheeler "Judicial Review of Prerogative Power" (1992) 14 Sydney Law Review 432, 473.
[116] [1989] 1 All ER 509, 512-513. Sir John Donaldson MR became Lord Donaldson MR between the *Datafin* and *Guinness* decisions.
[117] Above n 116, 539.

> In particular in considering whether something has gone wrong the court is concerned whether what has happened has resulted in real injustice. If it has, then the court has to intervene, since the panel is not entitled to confer on itself the power to inflict injustice on those who operate in the market which it supervises.

The New Zealand Court of Appeal in the recent *Cameron* decision agreed, albeit in obiter, with this highly flexible approach:[118]

> Decisions of unincorporated bodies exercising public regulatory functions may not easily fall for examination on conventional grounds of illegality, irrationality and procedural impropriety. In appropriate cases a more flexible approach may be called for.

The following analysis deals with the applicability of the traditional principles of judicial review to self-regulatory bodies.

1 Illegality

(a) Misinterpretation

Illegality traditionally includes the situation where the decision-maker misinterprets his or her powers as conferred by statute. In the context of self-regulatory bodies, the courts would apply this ground by determining whether the self-regulatory body has interpreted its governing code of practice correctly. The ground of illegality is usually concerned with the accurate literal interpretation of precise statutory language. However the codes under which self-regulatory bodies operate do not lend themselves to such technical scrutiny. This is partly because they have been drafted by non-lawyers in many cases. The codes are intended as guidelines, not rigid rules. They are intended to be interpreted according to their spirit rather than in strict compliance with the principles of statutory interpretation.[119] This allows self-regulatory bodies the degree of flexibility required to consider each

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[118] Above n 33, 12.
[119] Above n 21, 332; above n 6, 7.

case on its individual merits. It means that member organisations may not avoid the standards of the code by finding legal loop-holes. If the courts were to apply the illegality ground strictly, this could undermine these important advantages of self-regulation by forcing self-regulatory bodies to take a legalistic approach to their codes. The courts should therefore apply the concept of illegality in such a way as to afford the self-regulatory body in question a high degree of discretion in interpreting its own code. This approach was advocated by Sir John Donaldson MR in *Datafin*, who believed that the court should only find illegality (in the pubic law sense) if the body's interpretation was so far removed from the natural and ordinary meaning of its code that those relying on its decisions could reasonably be mislead.[120] Another reason for rejecting a strictly technical approach to the ground of illegality in respect of self-regulatory bodies is that these bodies, or the industries within which they operate, can easily amend their codes. They could therefore nullify the effect of a judicial review decision based on a strict interpretation of their codes by making the necessary changes.[121] The Advertising Standards Complaints Board, for example, responded to the Court of Appeal's finding in *Cameron* that public education advertisements were outside its jurisdiction by amending its code so as to bring these advertisements within its jurisdiction.

(b) Bad faith

There is no reason why the judicial review ground of bad faith, another aspect of illegality, should not be applied in respect of the decision-making processes of self-regulatory bodies. The notion of bad faith arises in many areas of law, both public and private. It does not presuppose a statutory basis to the exercise of power under review.

(c) Improper purpose

There is an abuse of power when a power is exercised otherwise than for the

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[120] Above n 13, 841.

[121] Lord Donaldson MR identified the difficulty of applying the ground of illegality to a body which is both "legislator" and "interpreter" in *Guinness*, above n 116, 512.

purpose for which it was conferred. The difficulty in determining the proper purpose in the absence of an enabling statute may be overcome by considering the proper purpose of self-regulatory bodies to be the promotion of the public interest. This would, however, be a very strict standard against which to assess an entity's decision-making process. Governmental bodies purportedly act in the public interest, yet the courts do not demand that their decision-making processes demonstrate this aim in respect of every decision which is challenged.

Although it may be difficult to apply the improper purpose facet of the ground of illegality in judicial review of a self-regulatory body, it should not be excluded altogether. The ground may be highly relevant in situations where the code under which a particular self-regulatory body operates explicitly states its objectives.[122]

(d) Relevancy

The relevancy grounds of review represent yet another aspect of illegality. A decision may be challenged on the basis that the decision-maker failed to take a mandatory relevant consideration into account. Alternatively, judicial review could be sought on the ground that the decision was influenced by an irrelevant consideration. The exercise of a statutory power has traditionally been integral to the application of the relevancy grounds of review. The criteria of relevancy have been supplied by the literal interpretation of the power conferring provisions as well as the scope and purpose of the empowering statute. The relevancy grounds are most readily applied where the power in question is narrowly defined. It becomes more difficult to determine what is relevant and what is not where there is a broad discretion associated with the power, as in an exercise of the prerogative.[123] Since the powers exercised by self-regulatory bodies may also be cast very broadly, they may not always lend themselves to the relevancy grounds of review. Lord Donaldson MR recognised this difficulty in *Guinness*:[124]

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[122] The Ministry of Consumer Affairs encourages the inclusion of a statement of objectives in self-regulatory codes of practice. Ministry of Consumer Affairs, above n 5, 7.
[123] Above n 115, 468-469.
[124] Above n 116, 512.

> [F]ailing to take account of relevant factors or taking account of irrelevant factors, is a difficult concept in the context of a body which is itself charged with the duty of making a judgment on what is and what is not relevant, although clearly a theoretical scenario could be constructed in which the panel acted on the basis of considerations which on any view must have been irrelevant or ignored something which on any view must have been relevant.

The difficulty of applying the relevancy grounds of judicial review to self-regulatory bodies must not be overstated. It seems unlikely that any self-regulatory body would have absolute discretion to determine which factors were relevant to a decision and which were not. Some factors could clearly be said to be relevant or not, having regard to the stated purpose of the governing code and the purported aim of self-regulatory bodies which is to further the public interest. The code of practice may clearly specify relevant considerations, such as in the case of the Banking Ombudsman's terms of reference. Clause 16 states that in making a recommendation or award against a participating bank, the Ombudsman must have regard to "any applicable rule of law or relevant judicial authority" and "the general principles of good banking practice and any relevant code of practice". The relevancy grounds of review would therefore be applicable.

2 *Irrationality*

The ground of irrationality or *Wednesbury* unreasonableness could be applied to self-regulatory bodies without conceptual strain. Indeed there may be less theoretical objection to such application than when it is used in judicial review of statutory power. A decision may be challenged for irrationality or *Wednesbury* unreasonableness when the decision is so unreasonable that no reasonable decision-maker could ever have come to it. Although the test allows a high degree of discretion to the decision-maker, the ground is inherently concerned with the substantive merits of a particular decision. The ground thus threatens the distinction between appeal and review, which legitimates judicial intervention into the exercise of statutorily conferred power. Since the power wielded by self-regulatory bodies is not derived from Parliament, review of the exercise of this

power does not involve a threat to the separation of powers or parliamentary sovereignty doctrines.

Although the courts need not be concerned with the constitutionality of applying the judicial review ground of irrationality to self-regulatory bodies, they must avoid replacing the decisions of these bodies with their own too lightly. A heavy-handed approach to the review of these entities for irrationality could introduce such a level of uncertainty as to make the self-regulatory system unworkable. The public and members of the regulatory scheme would lose confidence in the validity of the self-regulatory body's decisions if the courts were prepared to assess each decision on the basis of its substantive merits. In view of the stringent test for irrationality and the expertise of self-regulatory bodies in their own particular fields of regulation, the courts would probably adopt a highly deferential approach when examining their decisions for unreasonableness.[125]

3 *Natural justice*

Lord Donaldson MR in *Guinness* expressed concern about the applicability of natural justice, which embraces the concepts of bias and procedural fairness, to the Panel on Take-Overs and Mergers. He stated that "what is or is not fair may depend on underlying value judgments by the panel..." He said that it would be difficult to apply the ground of procedural impropriety considering that the [P]anel does not have any statutory or other guidance as to its procedures, which are intended to be of its own devising.[126]

Lord Donaldson MR, in expressing his concerns about the applicability of the natural justice ground of judicial review, arguably again overstated the difficulties of applying the traditional grounds of judicial review to self-regulatory bodies.

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[125] See C Graham "Self-Regulation" in G Richardson and H Genn (eds) *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Clarendon Press, Oxford, 1994) 189, 202.

[126] Above n 116, 512.

The courts should easily be able to apply the principles of natural justice to the decision-making processes of self-regulatory bodies in judicial review proceedings. Their application by the courts is no longer restricted to the judicial review context. The concept of natural justice is relevant to the exercise of non-statutory powers. Natural justice requirements are flexible, depending on the respective situation and the impact of an adverse decision upon the particular individual affected. The courts should apply the principles of natural justice in a flexible way, taking account of the time and other pressures under which self-regulatory bodies may operate. Hepburn, in her paper on natural justice requirements of commercial arbitration, expressed concern about the potential for natural justice to "supersede the regulatory structure of arbitration" if it is aligned with formal and adversarial procedures.[127] Similarly, strictly imposed natural justice requirements could undermine the advantages of self-regulation which include the flexible and informal nature of complaints adjudication under such systems.

VII JUDICIAL REVIEW REMEDIES AVAILABLE IN RESPECT OF SELF-REGULATORY BODIES

The JAA sets out the remedies available in an action for judicial review. Section 4 of the JAA states:

> On an application... for review, the [High Court] may...by order grant...any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction.

Section 4(5) of the JAA provides that the court may, instead of granting any of the above relief, direct the defendant to "reconsider and determine, either generally

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[127] S Hepburn "Natural Justice and Commercial Arbitration" (1993) 21 Australian Business Law Review 43, 48.

or in respect of any specified matters, the whole or any part of any matter to which the application relates".

The orders of certiorari, prohibition and mandamus are "public law remedies".[128] Certiorari and prohibition are complementary orders. Certiorari quashes a decision. It is retrospective. Prohibition has a similar effect but is prospective since it is issued in anticipation of an invalid act or decision. Mandamus compels performance where there has been a wrongful failure to discharge a legal duty.

Injunction and declaration, which are also available in private law, are known as "ordinary remedies". They were both developed by the courts of equity. Injunctions restrain the defendant from doing or continuing to do a wrongful act. A declaratory order states the legal position between the parties. There is no legal sanction associated with it. Failure to comply with an injunction or any of the public law remedies, on the other hand, may attract severe punishment as a contempt of court.

The remedies are all discretionary.[129] This means that the court may refuse relief even if the applicant succeeds in his or her challenge of the validity of an act or decision. Reasons for withholding a remedy include: conduct of the plaintiff (acquiescence or delay for example), the availability of alternative remedies (whether by an appeal procedure by otherwise), prejudice to third parties and futility.[130] While there are no legal barriers to the granting of these remedies in respect of judicial review of self-regulatory bodies, the courts may choose to tailor the exercise of their discretion to avoid frustrating the advantages of self-regulation.

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[128] They are also known as prerogative orders or writs.
[129] Above n 26, s 4(3).
[130] T Gilbertson, P Radich, M Scholtens and J Underwood "Judicial Review" (New Zealand Law Society Seminar, Wellington, July 1995) 57-60.

Monetary awards are traditionally not available as a judicial review remedy.[131] If an individual has suffered economic loss as a result of an unreasonable decision of a self-regulatory body, that individual cannot be awarded damages in judicial review proceedings. This is a major limitation of judicial review as a means of remedying grievances.

Sir John Donaldson MR in *Datafin* was faced with the argument that judicial review might compromise the Panel's speed and efficiency and the certainty of its decisions, and thereby disrupt the financial markets which it controlled. He addressed this by proposing a restrictive approach to the courts' discretionary power to grant remedies. Sir John suggested that if the Panel based a decision on a misinterpretation of its own rules, the court would not necessarily quash the decision. Rather, the court might give only declaratory guidance.[132] (One can only speculate as to whether Sir John would take a firmer position if the Panel repeated the error following such declaratory guidance.) Sir John described the relationship between the Panel and the courts as "historic rather than contemporaneous",[133] meaning that the courts would influence future decisions, but would not normally quash decisions which the Panel has already made.

It is interesting to note that Sir John proposed to retain the coercive remedies of certiorari and mandamus in respect of breaches of natural justice.[134] He thus subordinated the other grounds of review to procedural fairness, which Sir John considers to have the status of an enforceable right.

Sir William Wade has criticised Sir John's proposal to restrict the range of remedies available against the Panel on the basis that it would deprive litigants of a remedy.[135] He questions the value of extending the scope of judicial review,

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[131] *Takaro Properties Ltd* v *Rowling* [1978] 2 NZLR 314, 340. This principle was affirmed by the House of Lords in *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633, 730 (per Lord Browne-Wilkinson).
[132] Above n 13, 841.
[133] Above n 13, 842.
[134] Above n 13, 842.
[135] Above n 65, 439.

only to restrict the remedies which may then be granted.[136] Sir Patrick Neill agrees with Sir William's criticism of the court's novel proposals relating to remedies. He believes that it is the courts' function to grant relief to a successful applicant. If a body bases a decision on a misinterpretation of its code, that decision should be quashed. Merely providing guidance for the future in the form of a declaratory order is unsatisfactory according to Sir Patrick.[137]

The concern that Sir John's restrictive approach to remedies would limit the courts' ability to assist successful judicial review applicants is valid. However Sir Patrick and Sir William fail to acknowledge the serious consequences for the financial markets of making the Panel's decisions susceptible to a quashing order. One of the consequences would be that market participants could make tactical applications for judicial review and take advantage of the delay and uncertainty over whether the Panel's decision in question will stand. However, Sir John's restrictive approach should not be automatically applied to all self-regulatory bodies. The courts must balance the advantages of declaring self-regulatory bodies' decisions immune from judicial interference against the injustice of withholding a remedy from a successful judicial review applicant. The outcome of this balance will depend on the role of each self-regulatory body and the effect of introducing uncertainty into the finality of its decisions on the market in which it operates.

VIII CONCLUSION

Self-regulatory bodies may be extremely powerful. As a consequence of exerting regulatory power over their member organisations, they may in some circumstances seriously affect the rights of third parties who have not voluntarily submitted to their jurisdiction. Self-regulation has a number of advantages. The

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[136] Above n 65, 440.

[137] Sir P Neill "A Reply to Professor Sir William Wade's 'New Horizons in Administrative Law'" (9th Commonwealth Law Conference, Auckland, April 1990) 443, 445.

lack of accountability of self-regulatory bodies is, however, a significant disadvantage. Since industry self-regulation is likely to become an increasingly common phenomenon in New Zealand's deregulated economy, the question of whether the acts and decisions of self-regulatory bodies should be judicially reviewable needs to be addressed.

Whether any particular self-regulatory body is subject to the judiciary's public law supervisory jurisdiction is unclear. The New Zealand courts have indicated a willingness to subject some self-regulatory bodies to judicial review, however they have not clearly articulated the justification for doing so. The question of whether these entities should be held to public law standards of decision-making challenges the basis of the distinction between public and private law. The fact that the courts have been unable to devise a conceptually coherent test for amenability of self-regulatory bodies to judicial review indicates that they have lost sight of a coherent basis for the distinction.

Public law principles should apply to those entities which exist to serve the public interest. The imposition of the onerous standards of public law decision-making is justified since this furthers the public good. The impact on the individual liberties of such entities is of secondary importance since they themselves subordinate their own individual gain to the public interest. Although self-regulatory schemes are beneficial to the industries in which they operate, their primary purpose is to further the public interest. Indeed this is the basis upon which industries operating self-regulatory schemes fend off government regulation. Since these entities are self-professedly acting in the public interest, their acts and decisions should be subject to judicial review.

Despite having evolved in the context of the exercise of statutory power, the traditional grounds of judicial review are generally relevant to exercises of private power by self-regulatory bodies. The courts must, however, be aware of the environment in which these entities operate and apply the grounds with an appropriate degree of deference. The indiscriminate application of the grounds

could undermine the advantages of self-regulation. The courts should not adopt the "blanket" approach to the grounds of judicial review of self-regulatory bodies advocated by the English and New Zealand courts. This would result in a high degree of uncertainty as to whether a particular decision of a self-regulatory body is open to challenge.

The courts are lagging behind in their approach to the proper application of public law principles. They are fumbling with the vague concept of a "public function" as a test of amenability to judicial review and seem unable to define their role in controlling decentralised processes of public interest decision-making. This situation illustrates Sir Ivor Richardson's observation that the paradigms of legal thought no longer reflect New Zealand's social, political and economic realities.[138]

[138] See above n 4.

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