RACHEL JANE SCOTT

JUDICIAL REVIEW AND THE INSURANCE RATINGS REGIME

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CONTENTS

ABSTRACT

The Insurance Companies (Ratings and Inspections) Act 1994 ("the Ratings Act") introduced a disclosure based regime for non-life insurers. Unlike other such regimes there may be scope for judicial review. This is because the regime directly or indirectly empowers certain decision-makers: the Registrar of Companies, the Insurance Council and the two Rating Agencies which have been appointed and which prepare the ratings . This is not, however, an orthodox statutory regulatory regime. It is rather a regime which keeps direct government involvement to a minimum and relies on the expertise of a self-regulatory association (the Council) and the commercial regulatory power of international commercial rating agencies. Such a regime challenges the very foundations of judicial review.

This paper examines the ratings regime and sets it in the context of the way in which our society is ordered. It compares this pluralist ordering with the idea of the unitary state which is the underlying basis for judicial review. It examines the way in which the courts have dealt with regulatory power which challenges this conception of the state: particularly regulation by private bodies and the use of contract as a regulatory tool. It then illustrates the difficulties which arise by applying the case law to the decision-makers under the ratings regime. It concludes that judicial revew needs to develop new principles which recognise first, that society is pluralist and second, that contract is frequently used as a regulatory tool.

WORD LENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 12,100 words.

I INTRODUCTION

Broadly speaking, financial services comprise insurance and investment services Many consumers of such services do not have the expertise to judge either: the solvency or bona fides of the provider of the investment product; or the merits of the various products on offer. For this reason, financial services have been subjected to various forms of regulation both in New Zealand and overseas. These include self-regulation (with or without a statutory overlay), licensing and compulsory disclosure regimes.

Where a public body licences or regulates a service, there is clear scope for judicial review. But where a service is regulated by means of compulsory disclosure of information there is generally no such scope: the provider discloses the required information and the consumer is free to decide whether or not to buy the service in question. Thus the "market" regulates the service. This form of regulation has found particular favour in New Zealand. It fits in with the free-market philosophies current in New Zealand since 1984; it is also perceived as being simple and cheap.

The Insurance Companies (Ratings and Inspections) Act 1994 ("the Ratings Act") introduced a disclosure based regime for non-life insurers. Unlike other such regimes there may be scope for judicial review. This is because the regime directly or indirectly empowers certain decision-makers: the Registrar of Companies, the Insurance Council and the two Rating Agencies which have been appointed and which prepare the ratings . This is not, however, an orthodox statutory regulatory regime. It is rather a regime which keeps direct government involvement to a minimum and relies on the expertise of a self-regulatory association (the Council) and the commercial regulatory power of international commercial rating agencies. Such a regime challenges the very foundations of judicial review.

This paper examines the ratings regime and sets it in the context of the way in which our society is ordered. It compares this pluralist ordering with the idea of the unitary state which is the underlying basis for judicial review. It examines the way in which the courts have dealt with regulatory power which challenges this conception of the state: particularly regulation by private bodies and the use of contract as a regulatory tool. It then illustrates the difficulties which arise by applying the case law to the decision-makers under the ratings regime. Some conclusions are then set out.

More specifically this paper is structured as follows. Part II discusses the Brash report and sets out the reasons for regulating insurance and the theoretical foundations of the ratings regime. Part III examines the Ratings Act and part IV the decision-makers empowered by it. In part V I examine the agreements between each of the two rating agencies and the Council parts of which are deemed to form part of agreements reached between the rating agencies and the insurers. Part VI of the paper sets the ratings regime in context: the foundations of judicial review are discussed

and found to be wanting both in terms of the way in which society is ordered in general and against the ratings regime in particular. In part VII I discuss cases which illustrate the difficulties which arise when the courts are confronted with regulatory strategies which involve non-governmental bodies. Part VIII concerns the approach of the courts to contract when it is used as a regulatory tool. The amenability to review of each of the decisions-makers involved in the ratings regime is the subject of part IX and my conclusions are set out in part X.

The questions discussed do have a practical application. Insurers will be appreciably affected by the level of their ratings and have no right of appeal under the Ratings Act and only limited rights under the agreements between them and the rating agencies. The decisions of the Council and/or the agencies may be illegal, irrational or unfair[1] and the insurer affected may wish to have terms of the agreement declared invalid or a decision quashed. There is also possible that consumer groups may wish to challenge aspects of the regime, or particular ratings.

II THE BRASH REPORT

A Why Regulate the Insurance Sector?

People rely on insurance to protect themselves against events which are unlikely to occur but may have serious consequences if they do. If, for example, a major earthquake occurs in New Zealand the value of claims made on insurers will be huge. A failure by insurers to meet those claims will result in individual suffering and severe consequences could ensue for the whole New Zealand economy.

Major disasters occur infrequently. An insurer which covers, say, earthquake and fire damage may not be called upon to pay out significant sums for many years. Therefore, an unscrupulous or imprudent insurer may carry on business with insufficient funds for many years gambling on the unlikelihood of serious disaster. When a disaster occurs it is, of course, too late to do anything about the insurer's lack of funds.

Assessing what are "sufficient funds" is, however, not straitforward. It would be unreasonable to require an insurer to have funds sufficient to meet the insured value of every policy issued by it: only a small proportion of that amount may have to be paid out in any one year. The funds required will depend on the nature of the business written by the insurer and other factors. Only an expert can work this out. The accounts of an insurer may not be a reliable guide.

B Pre-1993 State Regulation of Insurers

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[1]The three principal grounds for judicial review. See *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 per Lord Diplock. *Webster v Auckland Harbour Board* [1987] 2 NZLR 129.

For the reasons outlined above, it is common for governments to regulate the insurance sector and/or to protect insureds against the insurer insolvencies.[2] Until 1993, the only state regulation specific to insurers was under the Insurance Companies Deposits Act 1995. The Act requires insurers commencing business in New Zealand to pay deposits to the Public Trustee. Since 1974 the deposit required has been $500,000 and prior to that the amounts were substantially less.[3]

New Zealand did not provide insureds with protection against insurer insolvencies. However, the Earthquake and War Damage Act 1944[4] provided for a system of limited state insurance administered by the Earthquake and War Damage Commission. Broadly, the Act provided that any property insured under a contract of fire insurance was automatically insured under the Act for earthquake and war damage.[5] In 1993 this Act was repealed. The Commission continues to exist under the Earthquake Commission Act 1993 but its future role is restricted to natural disasters affecting residential property and to a maximum amount of $100,000 per dwelling.[6]

C The Report

1 *The case for regulation*

The imminent repeal of the Earthquake and War Damage Act prompted the Minister of Justice to instruct Dr Brash and Mr McLean in 1993 to prepare a report on whether insurance companies and reinsurers carrying on business in New Zealand should be required to "obtain and maintain a satisfactory rating from a private sector rating agency".[7] The Brash Report concludes that there is a strong case for regulation of the industry given its peculiar features and the position which government might otherwise find itself in following a major disaster.[8] Other relevant factors were the relatively high risk of earthquakes in New Zealand, the fact that much of New Zealand insurance is placed with offshore insurers and the limited regulation of the insurance sector following the repeal of the 1944 Act.[9]

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[2] A Prudential Regime for Insurance Companies: Brash/McLean Report on the Insurance Companies Deposits Act 1953, 1993 ("the Brash Report")1.

[3] S 4(1)(a) of the Act. See J McDermott "The Insurance Deposits Act 1955: A legal audit" (1995) 25 VUWLR 499, 500. The deposit can be paid by giving security and the income from the deposit accrues to the depositor.

[4] See Reprinted Statutes Vol. 6, 207.

[5] The Earthquake and War Damage Act 1944, s 14.

[6] Earthquake Commission Act 1993, s 18.

[7] See above n 2, 1. Dr Donald Brash is and was the head of the Reserve Bank and one assumes he was selected because of his knowledge of prudential regimes in the banking sector (see discussion of the registration system for banks operated by the Reserve Bank at p 3 of the Brash Report). Ian McLean is a former National Member of Parliament (Tarawera) and was the Commissioner under the Earthquake and War Damage Act 1944.

[8] The Brash Report, 3-5.

[9] Above, 7.

2 *Regulatory options*

Time constraints are said to have precluded wide consultation[10] and different regulatory options are only briefly discussed.[11] A system of state licensing of insurers such as exists in other countries was preferred by the Insurance Council.[12] Although two benefits of state licensing are briefly noted,[13] this option is dismissed without further discussion because it would create a public expectation that government will stand behind a failed insurer[14] and does not provide the "ordinary consumer" with information on the insurer's financial status.[15] State guarantees of payment of certain types of claim are dismissed on similar grounds and because they burden the tax-payer.[16]

A private sector rating agency is preferred by Brash & McLean principally because it enables consumers to make an informed choice.[17] Further reasons are given for regulation by the private sector rather than the public sector: the government would be perceived to have less of a moral obligation to compensate policyholders;[18] the private sector will be more efficient because of competition from other agencies and the need to maintain reputation; and the private sector is said to be able to attract skilled staff due to higher rates of pay. A practical reason given is that private sector agencies will have world-wide expertise which will enable them to assess better the status of insurers operating in New Zealand but with overseas reinsurers or parents. It is also asserted that a threat by a private agency to downgrade a rating where an insurer refuses to supply information is likely to be more effective than a public sector agency's threat of legal action over non-compliance.

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[10] Above, 1.

[11] Above. Representatives of the Insurance Council, senior Department of Justice Officials, a Deputy Commissioner involved in Australian insurance regulation and a representative of a rating agency were consulted in the course of preparing the Report. Information was obtained concerning regulatory regimes in the United Kingdom and Canada and on an attempted non-compulsory rating regime in South Africa.

[12] Above, 8. It was noted that such regimes exist in Australia, United Kingdom, Canada and certain states in the USA and typically have several elements: Insurers must be approved; minimum standards must be met; where claims paying ability is in doubt, insurers are subject to detailed inspection; and firms which are found to be insolvent are put into a process which ensures an orderly exit (see Brash Report p 2).

[13] Above, 10. First they "can be tied in with the general law and procedures for the supervision of companies" and secondly, the state can have access to "the world-wide informal network of government regulators". The first "advantage" is difficult to follow. Insurance companies are subject to such law in any event and companies are not subject, of course, to systems of state licensing and supervision of the sort being discussed.

[14] Above, 8.

[15] Above, 9.

[16] Above, 6.

[17] Above, 9 & 11.

[18] Above, 10 & 11.

3 *Brash and McLean's recommendations*

Brash and McLean recommend that all fire and general insurers and any other insurers writing disaster insurance in New Zealand be required to obtain and maintain a credit rating from an approved private sector rating agency.[19] Insurers would be obliged to disclose their rating before a new policy is written and on proposals, renewal and expiry notices.[20] Any downgrading of a rating should be made public and all rating reports should be made available to the public and the ministry of justice.[21] The regime should have a statutory base but its details should be worked out in conjunction with the insurance industry.[22] The capital and deposit requirements relating to insurers should cease[23] and there should be no special inspection or insolvency regime for insurers.[24]

It is recommended that only one rating agency be appointed and that this should be on the basis of its strength in rating insurers in Australasia and world-wide.[25] The appointment should be made by the Secretary of Justice on the recommendation of the Insurance Council which was thought likely to be co-operative. To avoid monopoly pricing it was recommended that the Council negotiate the contract price.[26]

III THE INSURANCE COMPANIES (RATINGS AND INSPECTIONS) ACT 1994

A Introduction

The Ratings Act is in two parts. Part I establishes a ratings regime along the lines envisaged by the Brash Report except that more than one rating agency can be appointed and it seems that the price to be paid by the insurer for the rating is a matter for negotiation between an agency and an insurer.[27] The Act does not provide for the repeal of the Insurance Companies Deposits Act which instead is to be reviewed six months after the expiry of the period of two years following the first approval of an agency.[28]

Part II of the Ratings Act provides for the inspection by the Registrar of Companies of insurance companies of doubtful solvency and powers are given to the Registrar similar to those given under s 365 of the Companies Act 1993. The purpose thus appears to be to bring non-corporate insurers

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[19]Above, 12 & 22 &24.
[20]Above, 24.
[21]Above, 12 & 24.
[22]Above, 13.
[23]Above, 25.
[24]Above, 20 & 25.
[25]Above, 14 & 24.
[26]Above, 15 & 24.
[27]The Ratings Act, s 17.
[28]The Ratings Act, s 24.

into an inspections regime.[29] This paper is concerned only with the ratings regime created by the Ratings Act and the provisions relevant to that regime are discussed in more detail below.

B Insurers Required to have a Current Rating

Section 5 of the Act requires insurers to have a current rating from an "approved agency". A rating is an assessment (in letters, symbols, numbers or combinations of these) which indicates the insurer's ability to pay both existing and possible future claims.[30] It must be registered with the Registrar of Companies within five working days of receipt[31] and may be inspected by any person on payment of the prescribed fee.[32]

Section 5 applies to all insurers carrying on insurance business in New Zealand with certain exceptions. The two principal exceptions are as follows. First, no rating is required in relation to the business of life insurance carried out by an insurer.[33] Secondly, where an insurer is not a party to any policies of disaster or general insurance (as insurer not as insured) that insurer may elect not to have a current rating by lodging an election in the prescribed form with the Registrar.[34] "Disaster insurance" is insurance against loss caused by earthquake, natural landslip, volcanic eruption, hydrothermal activity or tsunami and includes any fire damage which results.[35] "General insurance" is other insurance against loss destruction or damage to tangible property including third party motor vehicle insurance.[36]

C Approved Agencies

Section 17 of the Act sets out the manner in which an agency becomes "an approved agency".

> 17. **Approval of Rating Agency** - (1) Subject to this section, the Registrar shall, on the recommendation of the Insurance Council, approve a person or organisation as an approved agency ... and more than one person or organisation may be so recommended or approved.
> (2) An approval under this section shall be for a term not exceeding 3 years ...
> (4) Before approving a person or organisation ... the Registrar must be satisfied -

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[29]The Ratings Act, s 2. An Insurance Company is defined to include both bodies corporate and associations of persons carrying any insurance business.

[30]Above, s 2.

[31]The Ratings Act, ss 5 and 6.

[32]The Ratings Act,s 7.

[33]The Ratings Act, s4. S 4 also provides for another exception: an insurer that carries on insurance business "only with members of a group of companies of which the insurer is, or was, also a member".

[34]The Ratings Act, s 9.

[35]The Ratings Act, s 2.

[36]Above.

> (a) That the person or organisation has entered into a deed of agreement with the Insurance Council as to the method to be adopted and criteria to be used in determining ratings to be given to insurers ... ; and
> (b) That insurers that are required to have ratings under this Act but that are not members of the Council have been consulted about the terms of the agreement.
> (5) The registrar shall keep a copy of the agreement available for inspection, without fee, by any insurer that is required to have a rating ...

Thus the sequence of events appears to be as follows. First, the Insurance Council selects an agency or agencies; second, it consults with insurers who are not members, third, it enters into an agreement with that agency or those agencies (I will call an agreement of this sort a "council/agency agreement") fourth, it recommends the agency or agencies to the Registrar and fifth, the Registrar approves an agency or agencies but not until it is satisfied that the agency/council agreement has been entered into and the Council has consulted with insurers who are not members.

The Registrar can revoke the approval of an agency if he or she is satisfied that the agency has, without sufficient cause, failed to provide a rating for an insurer. But before doing so, he or she must give the agency an opportunity to comment.[37]

D The Agreements

Section 19(1) of the Act requires that a council/agency agreement deal with certain matters:

> **19. Agreement to govern ratings** - (1) Every agreement ...-
> (a) Must set out in a schedule to the agreement the method to be adopted and the criteria to be used by the approved agency in determining ratings ... ; and
> (b) May set out in that schedule terms applying to the provision of ratings by the approved agency.

Section 19(2) of the Act envisages that an agreement will be entered into between the rating agency and the insurer (I will call this type of agreement an "agency/insurer agreement") and provides that the schedule to the agency/council agreement is deemed to form part of an agency/council agreement and overrides any provisions which are inconsistent with it.

The rating criteria and method (and potentially other matters) are, therefore, determined by the Insurance Council and the agency and then imposed upon the insurer. However, the picture is more complex as the Council is a representative of its members and has a duty to consult with non-members as to the terms of the agency/council agreement. The Council could, therefore, be described as the representative of all affected insurers when it agrees the terms of the agency/council agreement.

E Disclosure of Ratings and Credit Watch Warnings

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[37]The Ratings Act, s 18.

It has already been noted that an insurer's rating is registered and, therefore, available for public inspection. Where an insurer receives notice in writing of a "credit watch warning" given in relation to it, it must within five days register with the registrar a certificate from the agency containing the warning and stating the reasons for it.[38] A "credit watch warning" is a word, expression or symbol used by an agency to indicate that the agency is considering downgrading the rating of the insurer.[39]

An insurer is obliged to give public notice (in an issue of the New Zealand Gazette and in a newspaper) within ten days of the downgrading of any rating and is liable on summary conviction for a fine of up to $50,000 in the event it fails to do so.[40] Disclosure to an insured is required before the contract of insurance is entered into and on renewal and if such disclosure does not occur, the insured has the right to cancel the policy.[41] Insurers which are not required to be rated must, prior to entering into or renewing a contract of insurance (except life insurance), disclose their election not to be rated.[42]

The Registrar is required to keep a copy of any agency/council agreement or agreements available for inspection without fee by any insurer required to have a rating.[43] The agreements are also available for inspection by the public on payment of a fee.[44]

F Appeal and Review

The Act does not provide an insurer with any mechanism for appealing against or reviewing the decisions of the Registrar, Insurance Council or the rating agencies.

IV THE DECISION-MAKERS

A Introduction

The scheme created by the Act identifies three decision-makers: the Registrar of Companies, the Insurance Council and the rating agency or agencies. The first is a statutory office-holder, the second is a private

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[38]The Ratings Act, s 6(2).

[39]The Ratings Act, s 2.

[40]The Ratings Act, ss3 and 8.

[41]The Ratings Act ss 10 and 11.

[42]The Ratings Act, s 12.

[43]The Ratings Act, s 17(5).

[44]The agreements are not "registered" with the Registrar and there is no specific requirment in the Act that they be made available for public inspection. However, the Registrar appears to have decided to keep a "register" of the agreements under s 21 of the Act. It would then follow that under s 363 of the Companies Act 1993 the agreements may be inspected by any person.

incorporated society and the third are international companies. Each of these decision-makers is discussed below in more detail. However, it must be borne in mind that the rationale for the regime is that the consumer ultimately decides and, therefore, regulates the insurance sector: this is the rationale expressed in the Brash report and is implicit in the disclosure-based regime implemented by the Act. The market's role as the fourth decision-maker will be discussed later in this paper.

B The Registrar

The Registrar means the Registrar of Companies "appointed under the Companies Act 1993".[45] The Companies Act provides for the appointment of Deputy Registrars, District Registrars and Assistant Registrars who may exercise the powers duties and functions of the Registrar subject to his or her control and of those higher in the hierarchy.[46] Under the Companies Act the Registrar is required to keep registers of companies, accept documents for registration and make documents available for inspection by members of the public.[47] Pursuant to s 21 of the Ratings Act it is obliged to keep "such registers as are necessary" for the purpose of Part I of the Act.

C The Insurance Council

The Insurance Council of New Zealand Incorporated[48] traces it origins back to 1895[49] and is an association for the fire and general insurance industry. Until the Act, it was not recognised by statute and exercised no statutory powers or functions. Although membership of the Council is voluntary, it states that it: "represents over 90% of insurers and accounts for approximately 80% of business conducted in the New Zealand market".[50]

To become a member of the Council an insurer must be carrying on business in the insurance industry in New Zealand. "Insurance" is broadly defined but excludes life insurance.[51] The insurer must comply with the Council's solvency requirements in order to become a member and is required to supply information to the Council at regular intervals so that the Council can monitor solvency.[52]

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[45]The Ratings Act, s 2. The Companies Act 1993 states that the actual appointments are made under the State Sector Act 1988 (see ss 357 and 358 of the Companies Act 1993).

[46]The Companies Act 1993, ss 357 and 358.

[47]The Companies Act 1993, ss360, 362 and 363.

[48]It is incorporated under the Incorporated Societies Act 1908.

[49]Literature obtained from the Council in 1996: last year it celebrated its centenary.

[50]Above.

[51]See the Council's rules below n 59, paras 2 & 5.

[52]By-laws and Solvency By-laws of The Insurance Council of New Zealand Inc.

Membership of the Council ceases in various circumstances including on ceasing to be a participant in the Ombudsman Scheme[53] and in the event that the member fails to remedy any solvency deficiency within a certain time.[54] In addition to participating in the Ombudsman Scheme, members are required to conduct themselves in accordance with the Council's Code of Ethics.[55]

The Council is managed by a board which is to consist of between five and nine persons who are members of the Council. The members of the board are elected annually by a meeting of the Council.[56] The board appoints a chief executive officer who may have conferred upon him or her any of the powers exerciseable by the board.[57] The Council is funded by levies on members.[58]

The objects of the Council include: advising, co-ordinating and promoting the insurance industry; undertaking and facilitating research; disseminating information; representing the industry; liaison with similar overseas organisations; promoting and enforcing as between members a code of ethics; and supporting and promoting the Insurance and Savings Ombudsman Scheme and doing any other thing or pursuing any other objective "which may seem to the Council to be in the interests of members and for the benefit of the industry"[59]

Its rules give the Council a broad range of powers to enable it to carry out its objects.[60] Amongst these is the power to:[61]

> enter into any arrangement with any Government ... that may seem conducive to objects of the Council ... and to obtain from any such Government ... any ... charters Acts of Parliament monopolies rights powers privileges and concessions which the Council may think it desirable to obtain ...

It can be assumed that it was pursuant to this power that the Council agreed to play its role under the Act.

D The Rating Agencies

1 *Introduction*

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[53]Above, para 19. The current Obudsman Scheme is the Insurance and Savings Ombudsman Scheme. The first Ombudsman for this scheme took office in January 1995. The scheme has no statutory basis and provides a dispute resolution service for non-commercial insureds.

[54]The Solvency By-laws above n 52 para 1(g).

[55]Currently called the "Fair Insurance Code".

[56]Above, para 12.

[57]Above, para 14.

[58]Above, para 18.

[59]Rules of the Insurance Council of New Zealand Incorporated (as at 2 August 1996), para 3.1.

[60]Above, para 4.1.

[61]Above, para 4.1(n).

On 20 July 1995 the Registrar approved Standard & Poor's (Australia) Pty Ltd[62] and AM Best Inc.[63] under s 17 of the Act. Standard & Poor's and AM Best are amongst five international credit agencies with expertise in rating insurers.[64] Set out below is general information on each of the rating agencies and their procedures.

2 *Standard & Poor's*

Standard & Poor's has since 1966 been part of McGraw-Hill, an international publishing, media, information and financial services firm.[65] Its origins date back to 1906 when Standard Statistics began an information service on US industrial companies.[66] In addition to providing a financial rating service, Standard & Poor's provides a range of print publications including in New Zealand and Australia rating reports on all rated issuers/issues and a monthly bulletin.[67]

The Standard & Poor's Ratings Group claims currently to monitor the credit quality of US$ 1.5 trillion worth of bonds and other financial instruments world-wide.[68] It has offices in the United States, Europe and Asia and its analysts work in six departments: Corporate Finance, Financial Institutions, Insurance Rating Services and International Finance.[69]

Its Insurance Rating Department rates the claims paying ability of insurers as well as bonds and commercial paper issued by them.[70] Standard & Poor's started rating the claims paying ability of insurers in 1983 and is now the second leading insurer rating agency by number of United States insurers rated.[71]

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[62]Incorporated in Australia.

[63]Incorporated in New Jersey U.S.A.

[64]See "NAIC Report- Insurance Company Rating Agencies: A Description of Their Methods and Procedures Executive Summary" in Best's Insurance Management Reports "A special Report from the AM Best Company" February 19,1992. The other agencies are Moody's Investors Service, Duff & Phelps and Weiss Research.

[65]Current literature from Standard & Poor's Melbourne office.

[66]Above.

[67]Above.

[68]Current literature.The group offices are in Frankfurt, London, Madrid, Mexico City, New York, Paris, San Francisco, Stockholm, Tokyo and Toronto.

[69]Current literature, above.

[70]Above.

[71]See the summary of a paper issued by the National Association of Insurance Commissioners in Best's Insurance Management Reports, February 19, 1992: "A Special Report from the AM Best Company: Insurance Company Rating Agencies: A Description of their Methods and Procedures", 3.

Standard & Poor's rates the claims paying ability of more than 300 insurance organisations world-wide.[72] The claims ratings are performed at the request of the insurer and the insurer pays a rating fee in the range of US$ 15,000 to US$ 32,000 depending on size and other factors.[73] Claims ratings are kept under "continuous surveillance" and reports are widely distributed in a range of publications.[74]

Standard & Poor's also monitors about 2,000 US companies by way of "qualified solvency ratings". Its United Kingdom subsidiary, monitors a further 1,200 insurers outside the US.[75] The qualified solvency ratings are not requested and are assigned to insurers on the basis of publicly available information.[76]

The rating symbols used by Standard & Poor's range from AAA (superior financial security) through to CCC (extremely vulnerable financial security) with R connoting "regulatory action". Ratings AAA to BBB are the "secure range" and ratings BB to R the "vulnerable range".[77]

3 *AM Best*

AM Best was incorporated in 1899 and claims to be the first rating agency in the world to report on the financial condition of insurance companies.[78] AM Best publishes a range of reports on the insurance sector both in the US and elsewhere. Its 1994 Property/Casualty and Life/Health editions of Best's Insurance Reports are said to contain more than 2,400 and 1,575 companies respectively on insurers operating in the US market (virtually all significant and active companies); its International Edition began in 1995 and reports on more than 1,100 foreign property/casualty and life/health companies in 65 countries.[79]

Ratings of US companies are evaluated annually and quarterly and following any significant event. The annual review is performed following a "comprehensive collection of information requested" by AM Best.[80] The fee for obtaining a rating from AM Best is, typically, US$ 500. Companies which do not meet AM Best's criteria for being rated are

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[72] Above n 65.

[73] Above n 64.

[74] Standard & Poors Guide to Claims-Paying Ability Ratings, 2. A copy is appendix 2 to the S & P Deed, below n x. The publications include: S & P's Insurance Book, S & P's Insurer Solvency Review, S & P's Insurance Digest, S & P's FOCUS Magazine and S & P's Insurer Ratings List.

[75] Above n x (the lit).

[76] Above n 64, 4.

[77] Above n 74, appendix. Ratings from AA to B may be modified with the addition of a "+" or a "-".

[78] The Preface to the 1995 Edition of Best's Insurance Reports-International, vii. A copy forms appendix 2 to the AM Best Deed.

[79] Above.

[80] Above.

assigned a "not assigned" rating classification or a Financial Performance Index (FPI) assignment.[81] AM Best provides a host of other information services.[82]

AM Best uses a variety of different rating classification systems.[83] The scale adopted for the rating of New Zealand insurers ranges from A++ (superior) to D (very vulnerable) with E signifying "under supervision" and F "in liquidation". The range A++ to B+ is categorised as "secure" and B and below as "insecure".[84]

V THE AGENCY/COUNCIL AND THE AGENCY/INSURER AGREEMENTS

A Introduction

On 13 and 19 July 1995 respectively Standard & Poor's and AM Best had entered into agreements with the Insurance Council as required by s 19 of the Act. The agreements are in the form of deeds. They are registered with the Registrar of Companies and may be obtained on payment of a fee.

Both Deeds contain schedules setting out the rating method and criteria and other terms which, under s 19(2) of the Ratings Act, are deemed to form part of each agency/insurer agreement. The schedules require that the insurer provide certain information to the agency and that the agency prepare a rating in accordance with the methodology set out. The insurer must also pay the fees set out in the agency/insurer agreement.[85]

B The Standard & Poors Deed

The Standard & Poors Deed ("the S & P Deed") provides that Standard & Poors will ensure that it has the ability to carry out ratings on any entity which wishes to carry on insurance business in New Zealand.[86] It agrees that its ratings will be in accordance with the Act and the S & P Deed.[87] Ratings of insurers are to be determined in accordance with the method and criteria set out in the schedule and the schedule is deemed to be incorporated into every agreement between the agency and the insurer.[88] The Deed takes effect from the date of approval of Standard & Poors by the

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[81] Above n 64, 3.

[82] Above n 78, viii.

[83] Above n 64 , 3.

[84] See AM Best Deed below, 15.

[85] I understand that the rating fees charged by AM Best to New Zealand Insurers are in the order of US$ 12,000 per annum. I am unaware of the fees charged by Standard & Poors.

[86] The S & P Deed, cl 2.2.

[87] The S & P Deed, cl 2.1.

[88] The S & P Deed, cl 4.1 and 5.

Registrar (20 July 1995) and terminates on expiry or earlier termination of the approval.[89]

The Deed and the schedule may be amended but the amendment will not be effective unless approved by the Registrar.[90] Standard & Poors cannot assign or sub-contract its obligations under the Deed unless it has the prior approval of both the Council and the Registrar.[91] It is provided that the Deed shall be governed by the law of New Zealand.[92]

The schedule to the S & P Deed (which forms part of any agreements between the insurer and Standard & Poors) requires the insurer to provide to Standard & Poors "such information as is deemed necessary" and sets out a non-exclusive list of the type of information required.[93] The insurer is obliged to make senior executives available for interview as required by Standard & Poors.[94] During the currency of the rating the insurer is required to provide material financial and other information, and any information requested by Standard & Poors.[95]

Standard & Poors agrees to prepare the rating in accordance with the methodology and criteria set out in Part B of the Schedule and to prepare a draft rating report based on information obtained.[96] The draft rating report is to be provided to the insurer within a reasonable time (usually not exceeding 60 days) and : '[t]he Insurer will have the opportunity to discuss and comment upon the draft report".[97] If the insurer wants the draft rating re-examined, it has two working days to notify S&P and provide grounds of appeal and it is then in S&P's "sole discretion" whether it then amends the draft rating.[98] If the insurer does not object to the rating, Standard & Poors must assign the rating within 15 days of delivery of the draft report.[99]

The insurer agrees to register the rating within 5 working days and to make disclosure as required by the Act[100] and Standard & Poors will, in any event, advise the Registrar within that period that a rating has been

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[89]The S & P Deed, cl 6.1.
[90]The S & P Deed, cl 7.1.
[91]The S & P Deed, cl 8.1.
[92]The S & P Deed, cl 9.1.
[93]The Schedule to the S & P Deed, Part A, cl, 1.
[94]Above, cl 1.2.
[95]Above, cl 1.3.
[96]Above, cl 2.1.
[97]Above, cl 2.2.
[98]Above, cl 2.4.
[99]Above, cl 2.3.
[100]Above, cl 3.1.

delivered.[101] Standard & Poors and the insurer are able to publish the rating and associated information.[102]

It is agreed that Standard & Poors will monitor the affairs of the insurer throughout the term of the rating and "if circumstances occur which the Agency believes justify review of the rating, the Agency will notify the Insurer and may place the Insurer on any credit review, credit watch or credit warning list published by the agency". A certificate of the credit watch warning is to be provided to the insurer within five working days and this is to be registered with the Registrar.[103] Standard & Poors notifies the Registrar that such a warning has been issued.[104]

The agreement can be terminated on 90 working days notice and automatically upon expiry or earlier termination of Standard & Poors approved agency status.[105] New Zealand law is to govern the agreement.[106]

C The AM Best Deed

The AM Best Deed (but not the schedule to it) is in the same form as the S & P Deed discussed above.

The Schedule to the AM Best Deed, however, is different in the following respects. First, the information and access to personnel to be provided by the insured is expressed in a different way[107] as are the methodology and criteria set out in part B of the Schedule.[108] Except in relation to the criteria to be applied, the AM Best Deed is more specific than the S & P Deed regarding the information required and the steps to be taken.

Second, the provisions relating to "credit watch warning" are similar[109] but those concerning the procedure for finalising the rating are quite distinct. Under the AM Best Deed a draft report is to be provided to the insurer within 45 days of receipt by AM Best of necessary information. It is stated that the insurer "will have an opportunity to discuss and comment upon the report"[110] but, unlike the S & P Deed, there is no provision for an appeal.

D Comments

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[101] Above, cl 3.3.
[102] Above, cls 3.2 and 3.4.
[103] Above, cl 5.1.
[104] Above, cl 5.2.
[105] Above, cl 8.1.
[106] Above, cl 10.1.
[107] Compare part A, cl 1 of the Schedules to each of the Deeds.
[108] Compare part B of each of the Schedules.
[109] Part A of the Schedule to the AM Best Deed, cl 5.
[110] Schedule to the AM Best Deed ,Part A, cl 2.2.

The notable features of the agency/council agreements are as follows. First, they require the agencies to take particular matters into account in relation to the rating but not in relation to a credit watch warning (where they have an unfettered discretion). Secondly, they provide minimal opportunity for an insurer to challenge either the rating or the decision to issue a credit watch warning. Thirdly, the fact that the methodology and criteria are differently expressed in the two deeds suggests that the agencies are imposing their terms on the Insurance Council rather than the other way round.

VI THE NON-UNITARY STATE

A Introduction

A traditional form of government regulation of insurers may have involved subjecting them to regulation by an agency created by an Act of Parliament and empowered by that Act. Instead, the state has enacted legislation which employs the expertise and interest representation of a self-regulatory organisation (the Council) and the expertise, reputation and power of one international organisation (Standard & Poors) and a large US organisation (AM Best). Furthermore, the overall objective of the Act appears to be expose insurers to the market. It will be seen later in this paper that the Courts struggle to fit such types of regulation into the rubric of judicial review. This part of the paper examines why such difficulties arise and suggests that to resolve them the Courts need to acknowledge that the state is not unitary and to develop a rationale for judicial review which recognises this.

B Judicial Review and the Unitary State

The traditional basis for judicial review derives from the theories of the Victorian jurist, Dicey[111] and, in particular his assertion that in a representative democracy of the United Kingdom model[112] parliament (the legislature) is sovereign.[113] One aspect of parliamentary sovereignty is that parliament is omnicompetent: it can make laws and then unmake them and there is no other body which has the power to override or set aside legislation passed by parliament.[114] Another aspect is that

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[111]Craig (*Public Law* below n 114, 22) explains that the basis for judicial review was not initially conceived in these terms but that during the 19th Century it came to be so conceived.

[112]New Zealand's transition to Mixed Member Proportional representation does not affect the normative basis for Dicey's theory.

[113]Sir William Wade & C Forsyth *Administrative Law* (7 ed,Clarendon Press, Oxford, 1994) 24; PP Craig *Administrative Law* (3 ed, Sweet & Maxwell, London, 1994) 4. A W Bradley "The Sovereignty of Parliament" in J Jowell and D Oliver eds *The Changing Constitution* (Clarendon Press, Oxford, 1985) 23, 24.

[114]Above Wade, 29; Craig, 4. PP Craig *Public Law and Democracy in the United Kingdom and the United States of America* (1 ed, Clarendon Press, Oxford, 1990) 13.

parliament exercises a monopoly of power: that is all governmental power should be subject to parliamentary oversight and legitimation.[115] That is : "The state [is] unitary, with all real public power being concentrated in the duly elected Parliament".[116]

The traditional rationale for judicial review can be seen to follow quite simply from these propositions. First, if parliament is omnicompetent a body given power to act by parliament must not exceed the terms of its remit. If it were allowed to do so it would usurp the power of parliament.[117] Hence judicial review is available if such a body acts ultra vires (outside its powers).[118] Secondly, as parliament exercises a monopoly of governmental power, the Courts in their judicial review function need only concern themselves with exercises of this type of power: power exercised by bodies not empowered by parliament, even if regulatory in nature, is not the concern of judicial review.[119]

C *The State is Non-Unitary*

The theory of parliamentary sovereignty was at the time of its conception by Dicey,[120] and continues to be, flawed. First, it is clear that Parliament is not truly sovereign as it is dominated by the executive which has the power and the resources to initiate and develop legislation leaving the legislature with little real control over the legislative programme.[121] Even the power of parliament to criticise and to veto legislation is limited due to systems of party control designed to ensure that members comply with party dictates.[122]

Second, political theorists have long challenged Dicey's unitary conception of democracy and pointed to other powerful groups within society which shape and constrain state action.[123] Theories which espouse this view are broadly described as "pluralist". The pluralist thesis is that political (and other) decisions result from the interaction of powerful groups (which may include the executive and legislature) rather than solely from parliamentary or government initiatives.[124] However, how groups actually do interact and how they should interact is a matter for debate.

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[115]Craig *Administrative Law* above n 113, 4; Craig *Public Law* above n114, 20.

[116]Craig *Public Law* above n 114, 21.

[117]Craig *Public Law* above n 114 , 21. Bradley above n 113 , 27.

[118]Craig *Administrative Law* above n 113, 7.

[119]This is apparent from the cases discussed in the next part of this paper. See also Julia Black "Constitutionalising Self-Regulation" [1996] MLR 24, 43.

[120]Craig *Public Law* above n x, 30-47.

[121]See Craig *Public Law* above n 114, 39-47 See. R Mulgan *Politics in New Zealand* (Auckland University Press, Auckland, 1994) 69, 90-92, 109-111.

[122]Craig *Public Law* above n 114 , 45. Mulgan above n 121, 81.

[123]Craig *Administrative Law* above n 113, 25-32; Craig *Public Law* aboven114, 137-158. For a New Zealand perspective see Mulgan above n 121 chs 1, 2 , 9 & 13.

[124]Mulgan above n 121, 9.

Public choice theory is an aspect of the free-market policies current in New Zealand and elsewhere.[125] It prescribes a limited role for the state and eschews the legitimacy of group influence. This is because it sees individuals as the ultimate decision-makers.[126] However, devolution to the market can itself be seen as the "ultimate in pluralistic decentralisation"[127] and consumers may themselves form groups in order to promote their self-interest.[128] A distinctive model of pluralism can be discerned in the free-market policies pursued by recent English, New Zealand and other governments. It is described by Craig as "market-oriented pluralism".[129] It will be argued that policies pursued in New Zealand since 1984 are also manifestations of market-oriented pluralism as is the ratings regime itself.

D Market-oriented Pluralism

Paradoxically the introduction of free market reforms appears to require a strong state. This is so that the new policies can be implemented, their opponents defeated and to police the market to ensure equality of bargaining agents.[130] The remarkable changes which have taken place in New Zealand since 1984 could not have been effected otherwise.[131]

Society can still, however, be characterised as pluralistic. There is a preference for market-based solutions to economic problems, and an implicit assumption that the market is a better regulator than government. However, this means that decision-making by the market becomes a dominant and preferred form of decision-making in many areas.[132] A belief that the market is a better regulator than government dominant in the New Zealand reforms.[133] It is evident in both Treasury papers backgrounding the reforms[134] and in the policies pursued which have introduced or reinforced "market regulation" or "decision making by the market" in many areas.[135]

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[125]See J Boston "The Theoretical Underpinnings of Public Sector Restructuring in New Zealand" 1, 2 in Boston, Martin, Pallot and Walsh eds *Reshaping the State: New Zealand's Bureaucratic Revolution* (Oxford University Press, Auckland).

[126]Mulgan above n 121, 197. Above Craig *Public Law* 63.

[127]Craig, *Public Law* above n 114, 156.

[128]Craig *Public Law* above n 114, 63.

[129]Craig*Administrative Law* above n 113, 34; Craig*Public Law* above n 114, 153.

[130]Craig *Public Law*, above n 114, 155.

[131]See Mulgan above n 121, 110. Examples are the reform of industrial relations and the health sector.

[132]Craig *Public Law* above n 114, 156

[133]See above n 125.

[134]See J Kelsey *The New Zealand Experiment* (Auckland University Press, Bridget Williams Books, Wellington, 1995) 58.

[135]For example, employment, the financial markets trade and industry, foreign investment, resource management, and the media. This approach is also implicit in the corporatisation of state activities including land ownership, forestry, electricity, telecommunications, coal, airways, New Zealand Post, Government Property Services and the hospitals (See Kelsey above part 2).

Society also remains pluralistic because the initiating and shaping of policy is still the outcome of interaction between interest groups including government departments, external pressure groups, parliament and cabinet.[136] This is manifest in the development and implementation of the New Zealand reforms. The interaction of Cabinet, Treasury the State-Services Commission and the reserve Bank has been described.[137] Key lobby-groups which have influenced this process include the Business Roundtable, the Chamber of Commerce the Employers' Federation, Federated Farmers the Retailers' Federation and the Manufacturers' Federation.[138]

An aspect of market-oriented pluralism is the tendency of the executive and groups to make policy which by-passes parliament.[139] For example, government may decide to attain its goals through the use of its wealth rather than by enacting laws.[140] It may do this simply by entering into a contract with a party in which case the contract will provide the terms on which payment is to be made. Alternatively, it may enact legislation which provides for funding of certain activities subject to funding agreements to be entered into between the Crown and the party.[141]

Enacting legislation has its disadvantages: legislation has to be developed and approved by parliament and there are delays (and associated expense) as well as political costs associated with the legislative process.[142] The use of government wealth and contracts, on the other hand, allows informal arrangements and experiments with policy choices.[143] In New Zealand "government by contract" is a notable feature of the free-market reforms.[144] The Health and Disability Services Act, for example, provides for "funding agreements" under which the Crown agrees to provide money to the four RHAs and other purchasers of health and disability services.[145] In return the RHAs agree to comply with the terms of the funding agreement which is an extensive document setting out detailed requirements for the services to be purchased.[146] In this type of situation, the contract is being used not as an instrument of exchange between the

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[136]Craig *Public Law* above n 114, 64.

[137]Kelsey above n 134, 49.

[138]Kelsey above , 73-81. Mulgan above n 121, 200.

[139]Craig *Public Law* above n 114, 187.

[140]See T Daintith "The Executive Power Today" in *The Changing Constitution* above n 113, 174.

[141]Daintith above n 140, 183.

[142]Daintith above n 140, 181 and see Craig *Public Law* above n 114, 187.

[143]Above.

[144]See J Boston in the preface to J Boston (ed)*The State Under Contract* (Bridget William Books, Wellington, 1995).

[145]The Health and Disability Services Act 1993.

[146]Ministry of Health *1996/97 Funding Agreement Between the Crown and the RHAs.* The Ministry allows inspection of a version of the Agreement which has deleted from it financially sensitive information.

parties but rather as a tool to regulate their conduct.[147] The state may also use contract as a regulatory tool where it is not providing funding. This will be discussed below in relation to the Ratings Regime.[148]

Parliamentary and, therefore, electoral control over government is restricted: it is further restricted when policy is implemented by government under regulatory contracts which receive no parliamentary scrutiny at all. Society is, furthermore, pluralist so that other bodies in society exercise power and perform regulatory functions similar to those performed by government and use contract as a regulatory tool. They are subject to no scrutiny at all.

E Market-Oriented Pluralism and the Rating of Insurance Companies

Although the ratings regime is premised on free-market ideas it manifests a strong state because it imposes market-based regulation on the insurance sector. The Brash Report also proceeds on the assumption that a mechanism which subjects insurers to the market will be more efficient. Hence little consideration is given to governmental regulatory control notwithstanding that it is the preferred form of regulation in other countries.

The ratings regime is pluralist. The regulation of insurers under the Act results not from licensing system imposed on insurers by the state but from the interaction of powerful groups within society: the market, a private regulatory organisation, specialist corporations and the state. Its thrust is that decisions about which insurers should thrive and which should fail is to be made by consumers, that is, the market. However, because insurance accounting is obscure, other powerful bodies are involved and are instrumental to the decision-making process: the Insurance Council, a private insurance sector regulatory organisation selects and negotiates terms with the rating agents. The rating agencies, private corporations, prepare the ratings for their insurer clients but are obliged to apply methodology and criteria agreed with the Council. The Registrar of Companies, a statutory office holder, approves the rating agents selected by the Council.

The initiation and shaping of the policy behind the Act can also be characterised as pluralist: it appear to have evolved through the interactions of the Governor of the Reserve Bank, the Earthquake and War Damage Commissioner, the Justice Department and the Insurance Council.

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[147]See J Martin "Contracting and Accountability" in *The State Under Contract* above n 144, 36, 39.

[148]See also, for example, the Civil Aviation Authority provided for under the Civil Aviation Act 1990. The body is funded partly by government and partly by user-pays. The regulatory mechanism is a "performance agreement" with the Minister of Transport.

A feature of the regime is the use of contracts as a form of regulation. In neither case is the contract used in the traditional way, as an instrument of exchange. The agreement between the Council and the agencies is not a bargain: its sole purpose is to determine how insurers will be rated. Nor is the agreement between the rating agencies and the insurers: it is simply a means by which insurers are required to be subjected to the ratings criteria and methodology.

VII THE COURTS AND THE PLURALIST STATE: REVIEW OF PRIVATE BODIES

A Introduction

The rationale for judicial review flowed from a conception of the unitary state. This conception is flawed. The state in both England and New Zealand can be categorised as species of market-oriented pluralism. The current case law contains little acknowledgement that groups in society other than government exercise powers which it may be appropriate to subject to judicial review. The ratings regime involves private bodies which combine to regulate insurers. Below I discuss in broad terms how key English and New Zealand cases have dealt with proceedings for judicial review of bodies not created by statute.

B Non-Statutory "Governmental" Bodies

The development of judicial review in New Zealand in relation to non-statutory bodies has been inhibited by the Judicature Amendment Act 1972 ("the JAA") which requires the exercise refusal to exercise, or proposed or purported exercise of a statutory power (as defined)[149] before the simplified procedure (an Application for Review) is available.[150] Although proceedings under the prerogative writs can still be brought,[151] they have been little used in the years since the passing of the JAA although their substantive availability remains the basis for an Application for Review.[152] In England, however, the procedural reforms do not require the exercise of statutory powers and are tied to the circumstances where the prerogative writs would be available.[153] This has allowed judicial review to develop outside the scope of the exercise of statutory powers.

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[149]Note, however, the extended definition in s 3 extends beyond powers or rights conferred by Acts to those conferred by or under the constition or other instrument of incorporation, rules or bylaws of any body corporate. The definition of "statutory power of decision" (included in the definition of statutory power) is extended accordingly.

[150]The JAA, s 4(1).

[151]See part VII of the High Court Rules.

[152]S 4(1) is to the effect that where a statutory power etc has been exercised etc the applicant is entitled to the relief he or she would have been entitled under the prerogative writs or in proceedings for a declaration or injunction. See *Re Royal Commission on the Thomas Case* [1980] 1 NZLR 602, 615 where the Full Court of the High Court indicated that the availability of such relief was a prerequisite.

[153]See Order 53 of the Supreme court rules (UK) and s 31 of the Supreme Court Act (UK).

A high point of review of private bodies was the decision of the English Court of Appeal in *Datafin* [154] where it was held that the Panel on Take-overs and Mergers, a self-regulating unincorporated body with no statutory, prerogative or common law powers, was a sufficiently public body to be subjected to judicial review. The Court found that both the origins and function of a body could be taken into account. The Panel operated in the public interest but was also part of a regulatory system underpinned by the state.

The Court relied on general statements made in an earlier High Court decision[155] to the effect that the only constant limits to the remedy of certiorari are that the tribunal is performing a public duty; and that its authority is not solely derived from an agreement. However, each of the judges ties the Panel's powers to government in some way. Thus Lord Donaldson refers to the need to recognise the "realities of executive power" and the enhancement of the Panel's powers by statutory powers wielded by the Department of Trade and Industry and the Bank of England.[156] Nicholls LJ reasons that there has been an implied devolution of powers by the Council of the Stock Exchange (a body with powers from a statutory source) to the Panel;[157] and Lloyd LJ says that there has been "an implied devolution of power" from the government to the panel so that the source of the power is at least in part governmental.[158]

In New Zealand, the Privy Council in *Mercury* [159] held that State Owned Enterprises ("SOEs"), which are notionally private companies formed under the Companies Act, are public bodies which may be subject to judicial review. The Privy Council referred to their public origins (their shares are held by ministers and they are established by the State-Owned Enterprises Act 1986) and their public functions.

In England a series of cases followed *Datafin* where it was unsuccessfully argued that the decisions of powerful private regulatory bodies should be reviewable. In each case the court found that review was unavailable. Thus a decision of the Chief Rabbi of Great Britain declaring a Rabbi unfit to hold office following an enquiry was found to be one which could not be reviewed.[160] The court said that in order for judicial review to be

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[154] *R v Panel on Take-overs and Mergers, ex parte Datafin & anor* [1987] 1 All ER 564.
[155] *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 All ER 770.
[156] *Datafin* above n 154, 567.
[157] *Datafin* above n 154, 587.
[158] *Datafin* above n 154, 585.
[159] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385.
[160] *R v Chief Rabbi, ex parte Wachman* [1993] 2 All ER 249; *R v Football Association Ltd, ex parte Football League Ltd* [1993] 2 All ER 833; *R v Jockey Club ex parte Aga Khan* [1993] 2 All ER 853. None of these bodies was empowered by statute or supported or sustained by statute or regulation.

available: "there must be not merely a public but a potentially a governmental interest in the decision-making power in question".[161]

Applications for review of powerful private bodies regulating sport and exercising de facto monopoly control over the sport in question, were held not to be capable of judicial review. In two High Court cases it was held that decisions of the English Jockey Club could not be reviewed even although the applicants had no contract with the club and therefore no contractual remedies.[162] Review was declined for similar reasons in a case involving the decision of the English Football Association to set up the Premier League although in that case the Court found a contract between the applicant (the Football League) and the Association.[163] In the *Aga Khan* case[164] the Court of Appeal denied review of a disciplinary decision of the Jockey Club referring to the entirely private origins of the Club and the existence of a contract between the Club and the applicant. Two of the three judges (Bingham MR and Farquharson J) suggested, however, that in the absence of a contract review might be available in some circumstances.[165]

C Non-Statutory "Domestic" Bodies

The cases discussed above do not explain another line of cases where the courts have been prepared to allow what is effectively judicial review of the rules and decisions of domestic bodies. These cases do not rely on a finding that the power exercised is derived from government. Relief is granted, in part, on the basis that the body operates as a system of "mini-government" in much the same way and with much the same public effects as a statutory body.

Thus in England rules of the Football Association[166] and the Pharmaceutical Society of Great Britain[167] could be declared invalid because they amounted to an unreasonable restraint of trade as could a decision by the Jockey Club not to award a training licence to a woman.[168] A rule of the Football Association which denied legal representation to a club appealing against disciplinary sanctions[169] and a decision of a union not to approve the election of a shop steward and made in breach of the principles of natural justice[170] could be declared invalid. In *Stiniato v Auckland Boxing Association (Inc) and Others*[171] the New Zealand Court

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[161]Above, 254.
[162]*R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207; *R v Jockey Club, ex p RAM Racecourses Ltd* [1993] 2 All ER 225.
[163]*R v Football Association ex p Football League* [1993] 2 All ER 833.
[164]*R v Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853.
[165]Above, 865 & 867 (per Bingham MR); 873 (per Farquharson LJ).
[166]*Eastham v Newcastle United Football Club* [1963]3 All ER 139;
[167]*Dickson v Pharmaceutical Society of Great Britain* [1970] AC 403(HOL).
[168] *Nagle v Fielden* [1966] 1 All ER 689 (CA).
[169]*Enderby Town Football Club v Football Association Ltd* [1971] 1 All ER 215 (CA);
[170]*Breen v Amalgamated Engineering Union* [1971] 1 All ER 1148 (CA).
[171][1978] 1 NZLR 1(CA).

of Appeal found that the Boxing Association's decision to refuse a license could be declared invalid in the event it had denied Mr Stiniato a right to be heard and, therefore, made a decision which operated as an unreasonable restraint of trade.

In all but one of these cases there was no contract between the decision-maker and the party affected and in the other the court stated that the absence of a contract was not a bar to relief.[172] In some of these cases (including *Stiniato*) the Court derided the invention of fictitious contracts to allow relief and stated that the rules of these bodies amounted to a code which should be subject to the control of the courts in the same way as a legislative code and applying the principles which apply to statutory bodies.[173] In each case the bodies exercised considerable or monopoly power.[174] and this is stated in several cases to be the basis for intervention.[175]

The high point of review of decisions of domestic bodies in New Zealand is *Finnigan v New Zealand Football Union Inc* (No 2)[176] where the High Court (following strong hints made in the Court of Appeal in its decision on standing)[177] found that, in relation to the decision to tour South Africa, the NZRFU was obliged to exercise the degree of care normally imposed on statutory bodies in the exercise of their powers.

The New Zealand and English Court of Appeal decisions concerning domestic bodies and discussed above were all decided prior to *Aga Khan* [178] where the English Court of Appeal clearly indicated that it did not support the general implication of public law duties in relation to decisions made by powerful private associations. Bingham MR and Farquharson J do not discuss the domestic body cases.[179] The third judge, Hoffman LJ, clearly disagrees with the proposition that these cases would now find their home in public law.[180] *Aga Khan* was decided on an Application for Judicial Review and not in ordinary proceedings for a declaration. However, it would seem unlikely that an English Appeal Court would circumvent this decision by allowing effective judicial review on all public law grounds of such bodies. The English Court of Appeal has, however, recently confirmed that a person affected by rules of

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[172]See *Dickson* above n 167, 440.
[173]See above eg *Enderby* 219; *Breen* 1154. *Stiniato*, 5 (per Richmond P) 26 (per Cooke J).
[174]The Football Association Ltd and The Football League Ltd (Eastham); The Football Association Ltd (Enderby); The Jockey Club (Nagle); A union (Breen).
[175]See in particular *Nagle* (above n 168, 693) where Lord Denning states: "If a man applies to join a social club and is blackballed, he has no cause of action ... but we are not considering a social club. We are considering an association which exercises a virtual monopoly in a field of human activity. By refusing or withdrawing a licence, the stewards can put a man out of business. This is a great power."
[176][1985] 2 NZLR 181
[177][1985]2 NZLR 159, 179.
[178]See above n 164.
[179]Except to record the arguments made by counsel.
[180]See *Aga Khan* above n 164, 875.

a private regulatory body operating as a restraint of trade but who has no contract with the body may obtain relief in ordinary proceedings.[181]

A result of an amendment in 1977 to the JAA[182] is that an Application for Review may be made in relation to powers or rights conferred by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate. The definition of "statutory power of decision" (included in the definition of statutory power) is extended accordingly. The amendment appears to have been in response to cases of the sort discussed earlier which suggest that non-statutory regulatory bodies may be analogous to statutory bodies and that, therefore, similar relief should be granted on similar grounds.[183] The JAA is a procedural reform and does not operate to extend the substantive grounds for relief.[184] In practice it may result in a greater preparedness to review private bodies.[185] It should be noted, however, that neither *Stiniato* nor *Finnigan* were Applications for Review under the JAA.

Recent decisions of the New Zealand High Court which endeavour to canvas the scope of judicial review of private bodies in New Zealand do not articulate any clear principles. The approach is conservative and incremental. It seeks to restrict review of private bodies to particular situations in the decided cases and to read down cases of the *Stiniato* type. Thus in *Peters v Collinge*[186] Fisher J said that "non-contractual" review of private bodies was restricted to "some special situations" and referred to bodies exercising quasi-public functions,[187] perhaps where the body contemplated an action of significant direct impact upon the public[188] and where exclusion powers or their exercise can be struck down as unreasonable restraints of trade. In *Waitakere City v Waitemata Electricity Shareholders*[189] Fisher J added to this list by referring to a voluntary or commercial organisation which is publicly owned and makes decisions in the public interest which could adversely affect the rights and liabilites of private individuals without other form of redress.[190] Cases such as *Breen* [191]and *Enderby*,[192] he says, can be explained on the basis that

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[181]*Stevenage Borough Football Club Ltd v The Football League Ltd* The Times Law Reports 9 August 1996 (on appeal from a decision reported in The Times Law Reports 1 August 1996).
[182]S 10 of the Judicature Amendment Act 1977.
[183]See the Eighth Report of the Public and Administrative Law Reform Committee, 20 and the Explanatory Note to the Judicature Amendment Bill in the Appendices.
[184]See above n 152
[185]For example the New Zealand Court of Appeal has emphasised that New Zealand adminstrative law is "significantly indigenous" and in this respect pointed to the "wider scope for judicial review" under the JAA than under the reformed English procedure. See *Budget Rent A Car v ARA* [1985] 2 NZLR 414, 418 (per Cooke J).
[186][1993] 2 NZLR 554.
[187]Citing *Datafin* above n 154.
[188]Citing *Finnigan* above n 176.
[189][1996] 2 NZLR 735, 747.
[190]Citing *Mercury* above n 159.
[191]Above n 170.
[192]Above n 169.

the courts are prepared to declare illegal and void certain contractual terms if they are contrary to public policy.[193]

D Conclusions

The approach to judicial review of private bodies in England and New Zealand is confused and lacks a clear conceptual base. The English approach is traditional and ties review to the exercise of powers which can be described as governmental. The result thus depends not on any clear principles but rather on whether there can be said to be some statutory underpinning. Thus if a body is so powerful that its powers need not be enhanced by statutory sanction, it will not be subject to review; whereas if its powers have to be shored up by government in some way it will. This is illogical and results from a failure by the courts to acknowledge that society is pluralist. It is also inconsistent with the approach of the courts in the domestic body cases.

Recent New Zealand cases suggest a desire not to extend the availability of review of domestic non-governmental bodies and do not assist either in clarifying the scope of review or settling any principles. The New Zealand procedural reforms add to the confusion: review is available under the JAA in relation to the exercise of statutory powers conferred under Acts yet the category of "governmental" bodies now extends beyond this. Review is also available in relation to the constitutions etc of incorporated bodies. Yet the substantive basis for reviewing such bodies is quite restricted and there is no logical reason why the procedure should not also be available in relation to unincorporated bodies.

VIII THE COURTS AND THE PLURALIST STATE: JUDICIAL REVIEW AND CONTRACT

The English Courts have excluded from the realm of judicial review bodies whose power is solely conferred by contract.[194] Furthermore the English Court of Appeal in the *AgaKhan* case found against the applicant, in part, because he had a private law remedy in contract although that case also involved a wholly private body.[195] In some cases, furthermore, the English courts have eschewed the availability of all relief simply because there is a contract between the parties even where the body itself is subject to a degree of statutory underpinning[196] or , in the realm of employment, a statutory body.[197]

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[193]Above n 189, 747; referring to *Enderby*.

[194]See text above n 155.

[195]Above n 164.

[196]*R v Lloyd's, ex p Briggs* [1993] Lloyd's LR 176; *R v Insurance Ombudsman, ex p Aegon Life Assurance Ltd* [1995] LRLR 101.

[197]*R v East Berkshire Health Authority, ex p Walsh* [1985] 1 QB 152 (CA); *R v Derbyshire Council, Ex p Noble* [1990] ICR 808; *McLaren v Home Office* [1990] ICR 824.

Contradicting this approach, however, are suggestions made that the decisions of Self-Regulating Organisations, made under their rules and affecting members who have contracts, may be subject to judicial review.[198] These bodies are underpinned by the Financial Services Act 1986 (UK). These cases appear to be the only United Kingdom authorities where a contract is treated as if it were a statutory code. In New Zealand some decisions of the Industrial Courts suggest that a registered agreement[199] or a collective employment contract[200] may be reviewable in the same way as a statutory code. However, none of these cases contain any careful analysis of the law.

The position of contractual powers exercised by statutory bodies has, on the other hand, been considered in some depth in New Zealand and England.[201] The New Zealand Court of Appeal discussed the position in the two *Webster v Auckland Harbour Board* cases.[202] There it was held that the Harbour Board, a body with statutory powers to license the foreshore, could be subject to judicial review on public law grounds. It was noted that a statute may expressly or impliedly require that certain matters be taken into account and that all such bodies must act in good faith.[203] The Court followed the approach of the English Court of Appeal in *Cannock* [204] where a local authority was found to owe public law duties in relation to its decision to issue a notice to quit made under statutory powers to manage property.

In *Budget Rent A Car Ltd v ARA* the Court of Appeal indicated that decisions to grant or refuse a license made under broad managerial powers conferred by an Act may be reviewed.[205] *Marlborough Harbour Board v Goulden*[206] on the other hand allowed judicial review of a decision to terminate employment made under specific statutory powers to appoint and employ personnel and remove or discontinue their offices. The Court

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[198]*Bank of Scotland v Investment Management Regulatory Organisation Ltd* The Scots Law Times, 16 June 1989, 432.
R v Lautro, ex p Ross [1993] 1 All ER 545, 554 (CA).

[199]*New Zealand Association of Inspectors in Schools & Education Officers & Pollock & Ors v Minister of Education & Director General of Education & New Zealand Public Service Association Inc* [1990] NZILR 962.

[200]Eg *Clark v Housing Corporation of New Zealand* Unreported, 17 August 1993, Employment Court, Wellington, WEC 19/93. The Court found that the employer had failed properly to exercise his discretion due to a misinterpretation, not of any statutory provision, but of the terms of the contract itself.

[201] For an analysis of the English cases see S Arrowsmith "Judicial Review and the Contractual Powers of Public Authorities" (1990) 106 LQR 277.

[202]*Webster v Auckland Harbour Board* [1983] NZLR 646, 650 (per Cooke & Jeffries JJ), 652 (per McMullin J); above n 1 (Cooke P, Casey and Bisson JJ). Cooke P expressly incorporates his ealier joint judgment; Bisson J cites from it with approval.

[203]It was held that as licensees of long standing the plaintiffs had a legitimate expectation that they would be consulted about the price increase.

[204]*Cannock Chase District Council v Kelly* [1978]1 WLR 1(CA). The tenant was defending proceedings for possession of the property.

[205]*Budget Rent A Car Ltd v ARA* above n 185.

[206][1985] 2 NZLR 378, 382.

of Appeal found that a statutory powers had been exercised and the contract operated to restrict the exercise of the power.[207]

The Court of Appeal took a different approach in the *Stock Exchange* case finding that a public body did not owe public law duties in relation to all its activities.[208] Where a body entered into contracts in order to perform a statutory function, review of a decision to suspend the listing of a company's shares made pursuant to a term of the contract would not be available under the JAA. This case was followed by the Court of Appeal in *Auckland Electric Power Board v Electricorp*[209] (on appeal to the Privy Council, *Mercury Energy Limited v Electricity Corporation of New Zealand Ltd*).[210] The Court said that Electricorp's decision to terminate a commercial contract to supply services to AEPB (later Mercury Energy) was the commercial decision of a body incorporated under the Companies Act. The source of the power to terminate was the common law of contract and not the SOE Act. There had been no exercise of a statutory power and judicial review was not, therefore, available.

The Privy Council disagreed with this analysis although it reached the same result. It found that an SOE is a public body [211] and the principles set out in *Wednesbury*[212] concerning the exercise of discretionary power applied to Electricorp when it exercised its discretion to terminate the supply contract.[213] The Privy Council found that there was no basis for review as there was no evidence that Electricorp had acted in breach of these principles. Lord Templeman commented that Electricorp was empowered to operate the business of generating and distributing bulk electricity: the discretion to enter into and determine contracts was, therefore, its alone.

The Privy Council indicated that review of "the decisions" of an SOE would be available either under the prerogative writs or the JAA. The SOE Act contains only broad empowering provisions. Thus on one reading *Mercury* suggests that where an Act confers a broad managerial role on a body all decisions made under powers conferred by contract are potentially capable of being reviewed both under the prerogative writs and the JAA.[214] There is some support for this view from the approach of Lord Templeman in an earlier case.[215] However, it is unclear that *Mercury*

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[207]Above , 381.
[208]*New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699.
[209][1994] 1 NZLR 551.
[210]Above n 159.
[211]Above.
[212]*Associated Provincial Picture Houses v Wednesbury Corpn* [1947]2 All ER 680.
[213]Above n 159, 389:
[214]Mai Chen adopts this interpretation. See Mai Chen "The Reconfiguration of the State and the Appropriate Scope for Judicial Review" in The State Under Contract above n 144, 112, 115.
[215]See *R v Basildon District Council, ex p Brown* (1981) 79 LGR 655 discussed in S Arrowsmith "Judicial Review and the Contractual Powers of Public Authorities" (1990) 106 LQR 277, 279. Note, however, that the case concerned termination of a license.

will be interpreted in this way. For example, the cases involving statutes conferring a broad managerial power involve bodies which bring to an end all the rights enjoyed under that contract: by termination on notice, cancellation of a license or a notice to quit as the case may be.

Let us say, for example, that a contract entered into under managerial powers confers a discretion and expressly or impliedly indicates that certain factors are to be taken into account in the exercise of the discretion. The cases do not appear to suggest that judicial review would be available on the basis that the contract itself was a code and these matters were not taken into account by the decision-maker.[216] That is, where a decision is made under a contract, the courts do not look to the terms of the contract itself to determine whether a decision made under it is illegal, irrational or unfair. They will look at whether the body has breached express or implied obligations contained in the statute; and in situations where a major right under the contract is infringed, or all the rights under the contract are removed, they seem prepared to review the decision on the other public law grounds. However, even this would seem unlikely where the contract itself provides the grounds upon which those rights can be terminated or the procedure to be followed. This is because in that event the court would have to look to the terms of the contract itself in order to assess the decision. This they are reluctant to do.

Conclusions

Extracting any clear principles from the cases is difficult. A persistent theme, however, is a failure[217] to treat a contract as a regulatory code which can be reviewed in the same way as legislation. The underlying assumption is that a contract is a private bargain negotiated between the parties and that judicial review is inappropriate except in the limited circumstances discussed.

The courts need to develop an analysis which considers the way in which the contract is being used. Where the contract is being used a public body or a powerful private body as a regulatory tool judicial review may be appropriate.

IX REVIEW OF THE DECISION-MAKERS UNDER THE RATINGS REGIME

A Introduction

In the following paragraphs I consider the potential for review of the decision-makers under the ratings regime.

B The Registrar

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[216]Except the cases at above nn 198, 199 and 200.
[217]Except above.

The Registrar of Companies is a statutory office holder[218] It has a variety of roles under the Act: It is obliged to keep the necessary registers. More importantly, it is required to approve a rating agency or agencies on the recommendation of the Council. Prior to giving its approval it must ensure that the Council has consulted with non-member insurers and that an agreement has been entered into between the Council and the rating agency or agencies.

The Registrar is thus a person who should be subject to judicial review under the traditional rationale[219] and it clearly so subject under the case law which, as we have seen, continues to apply this rationale.[220]

The Registrar carries out a routine role in the ratings regime except, possibly, in relation to approving the rating agencies. However, the Act appears to envisage that the Council selects the rating agencies as an insurer representative (it is one in relation to its members and must consult non-members) and using collective expertise. The scope for the Registrar to exercise any real power in the selection process, therefore, appears to be limited. In the event that an insurer refused to approve a recommended agency the Council could bring proceedings for judicial review of the Registrar's decision. The Court would have to consider the reasons for the Registrar's decision and whether it had acted illegally, irrationally or unfairly in coming to its decision.

C *The Insurance Council*

The Council is a self-regulatory incorporated association. There is, therefore, scope for review of its rules and decisions made under them pursuant to the non-governmental domestic body cases.[221] Proceedings could be brought either seeking declaratory or injunctive relief or under the JAA.[222] However, the scope for this type of review is limited and given the nature of the Council's rules[223] is unlikely to provide any basis for relief in relation to the Council's decision made in performing its role in the ratings regime.

Therefore, any scope for review must be found under the non-statutory "governmental" body cases.[224] Whether a body performs public functions is a factor which can be taken into account.[225] The Council plays a key role in a regime designed to benefit the public by providing them with

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[218]Except above.

[219]See text above n 45.

[220]A case concerning judicial review of the Registrar is *Coopers and Lybrand v Minister of Justice & Ors* (1984) 2 NZCLC 99,199: The question there was whether the Registrar had exercised his powers of inspection for an improper purpose or had acted unfairly.

[221]See text above n 166.

[222]See text above n 182.

[223]See text above n 48.

[224]See text above n 149.

[225]*Datafin* above n 154.

information to enable them to choose a solvent insurer. The ultimate purpose of the regime is to ensure that, in the event of a disaster, individuals and the public do not suffer due to the insolvency of an insurer or insurers. The Council is, therefore, performing a public function. The Council also exercises powers in a regime to which all insurers writing non-life insurance must submit. The exercise of monopoly powers is another factor suggesting that the Council is a body which should be reviewed.

However, there must be some basis for finding that the role of the council is governmental.[226] In its private role it exercises some power. But this power is augmented by the provisions of the regime. There is, therefore, sufficient "statutory underpinning" of its position to enable it to be reviewed under the principles set out in *Datafin*.[227] The Council is, furthermore, a self-regulatory body like the Panel of Takeovers and Mergers in *Datafin*.

Under the Ratings Act the Council recommends to the Registrar appropriate rating agencies.[228] This recommendation effectively determines which agencies will perform the ratings. Such a recommendation can be reviewed under the prerogative writs and the JAA.[229]

The Council has an express statutory obligation to consult with insurers who are not its members concerning the content of the Council/Agency agreement. Its role as an insurer representative would create a legitimate expectation on the part of members that they will be similarly consulted.[230]

D The Rating Agencies

The rating agencies perform the most important role under the ratings regime. They are private corporations. They operate by entering into contracts with individual clients. They are not bodies which regulate an area of activity by applying rules. There is, thus no basis for reviewing their decisions under the non-statutory domestic body cases.[231]

I turn now to whether they can be reviewed under the non-statutory "governmental" body cases. The agencies are exercising a public function for the reasons set out earlier in relation to the Council. The question is whether there is a sufficient degree of statutory underpinning of their

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[226]Above and see cases at nn 159 to 164.
[227]Above n 154.
[228]The Ratings Act, s 17.
[229]See *R v Electricity Commissioners, ex p London Electricity Joint Committee Company* (1920) Ltd & Ors [1924] 1 KB 171 at 192 (per Bankes LJ) and 208 (per Aitkin LJ). *Bradley v Attorney-General* [1988] 2 NZLR 454, 467.
[230]See eg *CCSU* above n 1; *Webster* above n 1.
[231]See text n 166.

position for them to be classified as governmental in relation to their role under the Ratings Act. In *Datafin*[232] the underpinning arose because the Panel's powers were enhanced by statutory measures which fitted around the role performed by the Panel.[233] The agencies are in much the same position. Absent their role under the Ratings Act they are simply corporations performing a service for a fee and which exercise a degree of power due to their reputations and their commercial practices, in particular wide publicising of their ratings. By virtue of the Ratings Act, however, virtually all insurers writing non-life business must obtain ratings from them: they exercise a duopoly of power in relation to the regulation of such insurers in New Zealand.

In the *Lloyd's* and *Insurance Ombudsman* cases[234] the English High Court found that bodies with a degree of statutory underpinning would not be reviewable due to contracts with the party seeking review. There is clearly a risk that these authorities would be followed given the tendency of the cases following *Datafin* to read down that decision.[235] Furthermore, the rating agencies are private corporations rather than self-regulatory organisations. This, too, may be used as a reason for distinguishing *Datafin*.

On the other hand, it can be argued that the *Lloyd's* and *Insurance Ombudsman* cases misinterpret the earlier authorities refer which to *sole* jurisdiction and not *any* jurisdiction conferred by contract.[236] There are, furthermore, other cases which, although not so thoroughly argued, suggest that a body which is so underpinned and exercises powers under contract may be reviewed.[237] There is also a basis for distinguishing the *Lloyd's* case. Lloyd's, unlike the rating agencies, does not regulate the whole insurance market and this was a factor in the Court's decision to decline relief.[238] The *Insurance Ombudsman* case is more difficult to distinguish: there the body was one of two which could exercise a complaints function recognised by the Financial Services Act (UK) and the Court found, therefore, that submission to its jurisdiction was voluntary and judicial review unavailable. This argument could be used in relation to the rating agencies.

In summary, an argument can be constructed to the effect that the rating agencies are bodies capable of review. A more difficult question is which of their decisions are reviewable. Although their power is, in part, derived from the Ratings Act, their role is set out in the agency/insurer agreements.

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[232]See above n 154.
[233]See text above n 156.
[234]Above n 196.
[235]Above n 154.
[236]See text above n 155.
[237]See cases above nn 198, 199 and 200.
[238]*Lloyd's* above n 196, 185.

The sorts of decisions of which review may be sought are as follows. First, an insurer may maintain that the agency has failed to take into account criteria or failed to apply the methodology set out in the agreement. Or the agency may have taken into account criteria not set out in the agreement. The agency may be poised to issue a credit watch warning which the insurer regards as completely unjustified (one which no reasonable rating agency could reach). In relation to a rating, the agency may have failed to give the insurer an opportunity to comment on the draft rating as required by the agreement.[239] Or the insurer may wish to argue that it should be given an opportunity to comment on a credit watch warning before it is issued. These are all the sorts of situation which judicial review has developed to cope with. Proceedings for breach of contract are unlikely to provide the sort of relief required. For example, the insurer may wish to obtain an order quashing a decision so it is not obliged to register the rating.[240]

If the cases recognised that the agreement was, in effect, a regulation then the position would be relatively straightforward. The cases concerning Self Regulatory Organisations[241] could form the basis for such an argument as could the employment case referred to.[242] A decision of the Labour Court[243] said that an collective employment agreement registered under the Labour Relations Act 1987 had quasi regulatory status so that a decision made under it could be reviewed. This status derived not just from the fact of registration but also because the Labour Relations Act provided that the agreement was binding on the parties, members of the union and those engaged in the industry to which the agreement applied.[244] It can be argued, therefore, that the Ratings Act confers regulatory status on the schedule to the agency/council agreement which is deemed to form part of the agency/insurer agreements.[245] On the other hand an English employment case has taken an opposite point of view.[246] In summary, there is an argument to the effect that the agreements have quasi statutory status but it is by no means certain of success.

If this argument failed the insurer challenging the decision could argue that *Mercury*[247] allows it to challenge decisions made by a public body under a contract on public law grounds. The difficulties here are illustrated by considering each of the decisions which could be challenged. First a rating decision by an agency which failed to take into account the rating criteria. The criteria are set out in the agreement, not in the statute and the cases do not support that a decision could be challenged on the

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[239]See part V.
[240]Under the Ratings Act, ss 5 & 6.
[241]Above n 198.
[242]Above n 200.
[243]*New Zealand Association of Inspectors in Schools* above n 199.
[244]See ss 82 and 83 of the Labour Relations Act 1987 (now repealed). See also *Bell (Inspector of Awards & Agreements v Broadley Downs Ltd* [1987] NZILR 959 (CA).
[245]Ratings Act, s 19(2).
[246]*R v East Berkshire Health Authority, ex p Walsh* [1985] 1 QB 152.
[247]See above n 159.

grounds of illegality in such a case.[248] The way round this argument would be that s 19(1)(a) of the Ratings Act impliedly requires that such criteria be taken into account by the agency.[249]

Turning then to a decision to issue a credit watch warning. This is entirely in the discretion of the rating agency. Does the decision in *Mercury* then allow the court to review this decision or is it restricted to terminations of agreements? The same question can be asked in relation to decisions made to issue ratings credit watch warnings where the insurer is of the view that it has had insufficient opportunity to comment. The answer, in my view, is probably no for the reasons expressed earlier.[250]

E Conclusions

The decisions of the Council can be reviewed and it is arguable that the decisions of the rating agencies can be reviewed. More significantly, the application of the case law to the ratings regime illustrates how inadequate it is to deal with a pluralist form of regulation.

X CONCLUSIONS

The State is not unitary and is better described as a species of market-oriented pluralism. Developments in New Zealand since 1984 are evidence that the organisation of the State in general is now along these lines. The conception and implementation of the Ratings Regime is an example. The two significant features of the regime are first, that it employs private bodies and secondly, that it uses contract as a regulatory tool.

Judicial review is premised on the unitary state which ties judicial review to governmental bodies and is chary of rules which are in the nature of contracts. Proceedings for judicial review of powerful non-statutory regulatory bodies has generally resulted in one of two outcomes. Either it is found that judicial review is unavailable because the body is "private" or the courts have strained the concept of government power in order to grant review. The result is conceptual confusion and a body of contradictory case law which is difficult to apply. New principles need to be developed by the courts which recognise first, that society is pluralist and secondly, that contract is frequently used as a regulatory tool. The difficulties which arise have been illustrated in relation to the ratings regime which is a pluralist form of regulation.

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[248]See part VIII.
[249]See *Webster* above n 1.
[250]See text above n 216.

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