Taking a Gamble

An Appraisal of *Problem Gambling*'s Approach to the Justiciability of Government Tendering Decisions

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago.

October 2016

Acknowledgements

My thanks must first go to Marcelo for his dual role as inspiring public law lecturer and encouraging supervisor. Without you forcing me to do an assignment on *Problem Gambling* last year, this topic would have never been born. Thank you for your support and enthusiasm over the year. I have greatly appreciated your thorough feedback, your help in focusing my ideas and that you have pushed me to ensure that this dissertation is the best it can be.

Thank you to my darling Imogen for your friendship over the years and your tireless cheerleading from across the ocean. I am so blessed to have a friend like you, who jumped at the chance to proofread this dissertation. Your expertise was invaluable.

Thank you to my wonderful family. You have showered me with love and support over the years. Thank you especially Mum for looking after me so well this year, for listening to me stress about life and for always being there to give me a hug.

Thank you Andy for being the most amazing and supportive boyfriend that I could ask for. You have been a source of joy and encouragement through the good and the bad.

And most importantly I must thank my Lord and Saviour from whom all these blessings flow. May all glory for this dissertation and for my life be given unto you.

"On God rests my salvation and my glory;
My mighty rock, my refuge is God."
Psalm 62:7

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I Introduction

The recent High Court judgment in *Problem Gambling Foundation of New Zealand v Attorney-General*[1] caused quite a stir when Woodhouse J set aside a government tendering decision. His decision appears inconsistent with the authoritative decision *Lab Tests Auckland v Auckland District Health Board*.[2] In that case, the Court of Appeal held that judicial review of government tendering decisions is not available, apart from instances of fraud, corruption, bad faith or analogous situations.[3] Justice Woodhouse considered himself bound by *Lab Tests* and made extensive reference to the case. However, in attempting to apply it to the situation before him, he unintentionally created a new way to approach the justiciability of government tendering decisions. His approach focuses upon on the specific context of the decision so I have labelled it the structured contextual approach.

In this dissertation, I want to compare the *Lab Tests* and *Problem Gambling* approaches in order to see which better reflects the aims of judicial review, while taking into account the specific concerns present in government tendering decisions. I do so over three chapters. In the first chapter, I will elaborate on the decision of *Problem Gambling* and highlight how it diverges from *Lab Tests*. My second chapter begins with an explanation of judicial review's justiciability inquiry and the different approaches *Lab Tests* and *Problem Gambling* use when engaging in that inquiry. This will highlight that *Problem Gambling*'s conception of justiciability is more conceptually sound, as it recognises that justiciability is a binary inquiry.

The remainder of chapter two will discuss two alternative sets of criteria that I will use to determine which approach – *Lab Tests* or *Problem Gambling* – is preferable. The first of these is a set of proposed normative aims focused on the purpose of judicial review. *Problem Gambling* better expresses these aims, as it allows judicial review to act as a special regime of legal control on a far wider set of actions. This reflects the need to hold the government to standards of good administration when it makes tendering decisions. The second criterion is the public-private divide, which attempts to classify decisions as either public or private in nature. *Lab Tests* reflects this concept more than *Problem Gambling*, because it views commercial decisions as private in nature. However, I will show that the public-private divide's binary classifications are of limited utility in an area where contextual factors can vary greatly. It is better to focus on whether private or public law norms are needed to answer a particular concern. *Problem Gambling* does this through its focus on contextual factors.

In my final chapter I consider a third criterion which focuses on how effective each approach is at achieving just results. I will look at the values of certainty and flexibility as alternate routes to justice. There is a need to balance the use of these two values in order for an approach to effectively provide justice, while not ignoring the need to provide commercial

[1] *Problem Gambling Foundation of New Zealand v Attorney-General* [2015] NZHC 1701
[2] *Lab Tests Auckland v Auckland District Health Board* [2008] NZCA 385.
[3] At [91].

certainty in this area. *Problem Gambling* is able to use both certainty and flexibility to reach just results, while *Lab Tests* largely rejects the need for flexibility. This suggests that *Problem Gambling* is more effective at ensuring justice.

Consideration of how well *Lab Tests* and *Problem Gambling* measure up against all three criteria reveals the utility and legitimacy of each approach. My assessment indicates that *Problem Gambling*'s approach is superior, as it is able to take all the relevant factors and concerns into account, and then come to a just result. *Problem Gambling*'s structured contextual approach is the method that courts should use to determine the justiciability of government tendering decisions.

II The Decision of Problem Gambling

A Facts

The Problem Gambling Foundation of New Zealand (the Foundation) is a charitable trust that provides both public health and clinical problem gambling services. The Foundation was the largest provider of these services in New Zealand, providing them since 1988.[4]

The Ministry of Health (the Ministry) has a responsibility under the Gambling Act 2003 (the Act) for developing, managing and implementing an "integrated problem gambling strategy".[5] To implement this strategy, in July 2013, the Ministry issued a Request for Proposals (RFP) for the provision of problem gambling services between 1 January 2014 and 30 June 2016.[6] The Ministry's RFP was a new process designed to select the organisations that it would offer contracts to provide public health and clinical gambling services. A panel appointed by the Ministry would evaluate proposals by those organisations. The panel deliberated in three stages: "pre-scoring", "consensus scoring" and "moderation", resulting in it making a recommendation to the responsible Ministry officer.[7]

The Foundation submitted two proposals but the Ministry decided not to offer it any major contract.[8] The Foundation took issue with this and decided to apply for judicial review of the Ministry's decision. Justice Woodhouse set out the Foundation's concerns as four issues:[9]

1) Is the decision able to be reviewed on some or all of the grounds pleaded?
2) Did the Ministry breach the rules governing the decision, or a legitimate expectation by the Foundation that it would follow the process laid out in the RFP?
3) Was the Ministry's decision flawed by material errors made by the panel when evaluating the proposals?
4) Were some or all of the panel members biased or under a conflict of interest?

The Court could only look at issues 2 - 4 if it first held that the decision was reviewable.[10] It is Woodhouse J's decision on this issue which is the focus of this dissertation.

B Justice Woodhouse's Decision on the Scope of Review

The Ministry relied on the Court of Appeal's decision in *Lab Tests* to argue for a very limited scope of review.[11] The Foundation submitted that *Lab Tests* was distinguishable because of the

[4] *Problem* Gambling, above n 1, at [1], [2]
[5] Gambling Act 2003, ss 317-318.
[6] At [4].
[7] At [21].
[8] At [5].
[9] At [9].
[10] In this chapter I use the term 'reviewable' to refer to the overarching question of whether the court can and should review a decision. In the following chapter I will unpack the term and argue that this decision is made up of two separate steps: jurisdiction and justiciability.
[11] *Problem Gambling*, above n 1, at [54].

material differences in the context of the present decision.[12] Justice Woodhouse therefore closely analysed this decision.

1 The Court of Appeal's decision in Lab Tests

Lab Tests is the authoritative decision in New Zealand on how to approach judicial review of government contracting decisions. The case involved a RFP by three District Health Boards (DHBs) for the provision of community laboratory services. The unsuccessful party sought judicial review of the decision, claiming that there were errors in the DHBs' decision making process arising from a conflict of interest and unfairness because of access to confidential information.[13]

Overruling the High Court, the Court of Appeal refused to review the DHBs' decision. The majority held that the Privy Council decisions *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*[14] and *Pratt Contractors Ltd v Transit New Zealand*[15] did not support any broad-based approach of probity in public decision making.[16] Justice Hammond issued a separate judgment in which he agreed with the majority but went into more detail about some of the theoretical issues in judicial review that the decision touched on.

Justice Woodhouse noted a number of points set out in the majority judgment as being pivotal:

- A public body involved in a commercial process (such as seeking tenders) must exercise its contracting power in accordance with its empowering statute. If it does not, the decision can be challenged under the ground of illegality.[17]
- "The procedural obligations of a body performing a public function will vary with context".[18] While one statute may impose natural justice obligations on a public body, these will not necessarily apply to its decisions under another.
- 'Context' includes "the nature of the decision being made, the nature of the body making the decision and the statutory setting within which the decision is made".[19]
- *Mercury Energy* indicates that courts will only review contracting decisions made by public bodies in commercial contexts in limited circumstances. Generally, other accountability mechanisms will be more appropriate.[20]

Justice Woodhouse was clear that *Lab Tests* did not establish "a prima facie rule 'subject to context'" but, rather, that context is the starting point.[21] Context is crucial because it allows a court to determine whether a decision "is so plainly founded on existing contractual

[12] At [55].
[13] *Problem Gambling*, above n 1, at [56].
[14] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).
[15] *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [2005] 2 NZLR 433 (PC).
[16] *Lab Tests*, above n 2, at [85]
[17] *Lab Tests*, above n 2, at [56].
[18] *Lab Tests*, above n 2, at [57].
[19] *Lab Tests*, above n 2, at [58].
[20] *Lab Tests*, above n 2, at [59].
[21] At [63].

arrangements that there is no scope for the application of broader public law procedural standards".[22] He considered that this was the case in *Pratt Contractors* and *Mercury Energy*.[23]

2 Justice Woodhouse's application of Lab Tests

Justice Woodhouse then analysed how *Lab Tests* should be applied in the case before him. He noted that the Court mentioned three contextual matters: the statutory setting, the nature of the decision and the nature of the body making the decision.[24] However, he decided that *Lab Tests* also supported consideration of other contextual matters.[25] These factors, and Woodhouse J's application of them, are discussed below.

(a) Statutory setting

According to s 317(2) of the Act, an integrated problem gambling strategy must make provision for two matters: measures to promote public health by preventing and minimising the harm from gambling; and services to treat and assist problem gamblers and their families. The first matter is a public health service- a broad category focused on reducing the risk of problem gambling generally. The second matter deals with the clinical treatment of current problem gamblers.[26] Justice Woodhouse viewed the presence of these broad public health services as differentiating the statutory setting from that in *Lab Tests*.[27]

The Act's provisions indicate that the Ministry was required to implement "a national strategy concerned with all health aspects – prevention through to treatment – of problem gambling".[28] Justice Woodhouse noted that the public health aspects of problem gambling needed to be aligned with other areas of public health.[29] This takes the decision away from being an intensely commercial one, to one having more of a policy aspect, and distinguishes it from other contracting decision cases.[30]

Another key factor was the "absence of prescriptive provisions as to how the strategy is to be implemented".[31] Justice Woodhouse used *Telco Technology Services Ltd v Ministry of Education*[32] to support his interpretation that the absence of statutory provisions requiring the Ministry to act in various 'commercial' ways differentiated it from the requirements of the DHBs in *Lab Tests.*[33]

[22] *Problem Gambling*, above n 1, at [63].
[23] At [63].
[24] At [58].
[25] At [65].
[26] *Problem Gambling*, above n 1, at [2].
[27] At [70].
[28] At [75].
[29] At [75].
[30] At [75].
[31] At [76].
[32] *Telco Technology Services Ltd v Ministry of Education* [2014] NZHC 213.
[33] *Problem Gambling*, above n 1, at [77].

Justice Woodhouse viewed the absence of legislative provisions that directly bear on the Ministry's decision, especially one requiring it to be made commercially, as supporting the appropriateness of judicial review in this context.[34]

(b) Mandatory Rules

The Mandatory Rules for Procurement by Departments (Mandatory Rules) contain guidance for government departments on procurement processes and were endorsed by Cabinet in 2006. They "set out mandatory standards and procedural requirements for the conduct of procurement by government departments" and they "reflect and reinforce New Zealand's established policy of openness and transparency in government procurement".[35]

After analysing the Mandatory Rules, Woodhouse J decided that they firmly pointed to a conclusion that the decision could be reviewed on all grounds advanced by the Foundation.[36] He considered that the rules provided a context that supports a broad scope for judicial review and that breaching them would vitiate a decision.[37]

(c) Nature of the decision

Justice Woodhouse did not consider that the mere fact a case involved a RFP was determinative of the scope of review.[38] He saw *Telco Technology* as an example of this. In that case, Collins J granted an interim injunction preventing the Ministry of Education from awarding the tendered contract to another bidder. Justice Collins distinguished his case from *Lab Tests* because it did not "simply involve commercial principles".[39] Unlike *Lab Tests*, the dispute was not very complex and not principally concerned with private law issues.[40] Therefore the public law concepts of reliance and breach of procedural obligations prevailed over the commercial aspects.[41] The concern is over the extent of the commercial element, not simply its presence.

In *Problem Gambling*, the Ministry was carrying out a public function, as indicated by the statutory context.[42] The public was affected because the decision concerned processes leading to the implementation of the entire problem gambling strategy.[43] This was unlike other cases which involved "tenders or proposals for specific services as a small part of a much broader area of public activity".[44] Since "the Ministry was making a decision bearing on all aspects of

[34] At [78].
[35] Rule 1.
[36] At [110].
[37] At [86] and [116].
[38] At [87].
[39] *Telco Technology*, above n 32, at [38].
[40] At [39].
[41] At [38].
[42] *Problem* Gambling, above n 1, at [88].
[43] At [89].
[44] At [89].

public health and clinical services for problem gambling", Woodhouse J considered that the nature of the decision points was public, which supported its justiciability.[45]

(d) Nature of the body making the decision

The fact the decision maker was a core government department was not determinative on its own.[46] However, when combined with other matters of context, such as the absence of express statutory duties to act commercially, Woodhouse J considered that it supported a broader scope of judicial review.[47]

(e) Any relevant contractual provisions

The RFP was not a process contract so it did not give rise to any contractual rights or obligations.[48] "The absence of any contractual rights for proposers and corresponding contractual obligations on the Ministry" helped support Woodhouse J's conclusion that the decision was reviewable.[49]

(f) Undue fettering of negotiation

The majority in *Lab Tests* determined that the imposition of onerous procedural obligations may unduly fetter the DHBs' power to negotiate effectively and handicap them when dealing with private parties.[50] Justice Woodhouse considered that this was one of the key reasons that the Court of Appeal found that the decision did not fall within the scope of judicial review.[51]

In contrast to the effect procedural obligations would have had in *Lab Tests*, Woodhouse J determined that there was no evidence that imposing the obligations on the Ministry would impede its ability to make a decision about the RFP. There was no negotiation with the organisations and the RFP did not expressly require consultation with the tenderers during the decision making process.[52] The only point at which commercial negotiations may have arisen was when the Ministry entered into negotiations with the successful proposer to form a contract.[53] Therefore undue fettering was not a concern in this case.[54]

(g) Complexity of the subject matter

Justice Woodhouse noted that "[t]he complexity of the subject matter raised by an applicant's complaint may provide grounds for declining an application for review, or at least limiting the scope of review."[55] He acknowledged that it would point against review if the court was asked to decide whether the panel reached an appropriate conclusion. However, given that the

[45] At [90].
[46] At [92].
[47] At [92].
[48] At [16].
[49] At [94].
[50] *Lab Tests*, above n 2, at [78].
[51] At [97].
[52] At [99].
[53] At [100].
[54] At [99] and [101].
[55] At [102].

questions here did not go to the substantive merit of the panel's particular conclusions, this would not be an issue.[56] Looking at the panel's decision-making process would not be too complex for a court to determine because "judges are regularly required to assess" the appropriateness of these processes.[57]

(h) What is alleged to have gone wrong

Justice Woodhouse considered that this factor brought up in *Lab Tests*[58] involved a similar inquiry to the previous issue. Therefore, he felt no need to address the matter further.[59]

(i) Availability of "non-judicial accountability mechanisms"

Justice Woodhouse noted that "the Court of Appeal considered that the existence of accountability mechanisms in the applicable legislation was an important consideration in rejecting [a] broad scope of review".[60] The lack of statutory controls on the Ministry's decision here indicated a broader scope of review. Justice Woodhouse rejected the Ministry's argument that the ability to complain to the Ombudsman or to ask for an inquiry by the Auditor-General under the Public Audit Act 2001 were effective accountability mechanisms.[61] The lack of any non-judicial accountability mechanisms therefore supported the need for a broad scope of judicial review in this situation.[62]

On the basis of these contextual matters, Woodhouse J held that the decision was reviewable on all grounds advanced by the Foundation.[63] He then determined the substantive merits of those grounds.

3 Justice Woodhouse's conclusion on the substantive issues and relief

The substantive issues claimed by the Foundation were the breach of a legitimate expectation to follow the Mandatory Rules, mistake of fact, and a conflict of interest. Although Woodhouse J found that the first was sufficient to give rise to a remedy, he analysed all the pleaded issues. He thought it was important to discuss their applicability, given his finding on the scope of review.[64]

The second issue required the court to analyse how the Mandatory Rules should be interpreted and applied, something well within its expertise. Justice Woodhouse found that the Foundation had established a material breach of the Mandatory Rules by the Ministry. This resulted in a breach of the Foundation's legitimate expectation that the rules would be followed.[65]

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[56] At [104].
[57] At [104].
[58] *Lab Tests*, above n 2, at [85].
[59] At [107].
[60] At [108].
[61] At [109].
[62] At [109].
[63] At [110].
[64] At [185].
[65] At [185].

The third issue alleged that the decision making panel's evaluation methodology was flawed to such an extent that the results were materially unreliable.[66] Based on expert evidence, Woodhouse J agreed that the methodology was flawed and that these mistakes resulted in the overall decision being materially unreliable.[67]

Finally, the fourth issue dealt with an alleged conflict of interest. This was the ground most substantively aligned with *Lab Tests* and Woodhouse J referred to the Court of Appeal's discussion of it.[68] He distinguished the case because there were no statutory provisions prescribing the way in which conflicts of interest should be dealt with by the panel.[69] Instead the issue was governed by the rules that did apply to the panel.[70] Justice Woodhouse used these contextual factors to determine the standard applying to the panel and then analysed whether the facts indicated that this had been met.[71] He concluded that there was apparent bias.[72]

Regarding relief, Woodhouse J had to determine whether he should use his discretion to set the decision aside.[73] He held that there was no good reason to refrain from awarding the Foundation the relief it sought.[74]

Looking at his analysis of these issues, in particular the fourth issue, it is clear that Woodhouse J's emphasis on context extends in application beyond the issue of the scope of review. It is important to note that the grounds pleaded by the Foundation are all standard issues of judicial review which are relatively straightforward. It is possible that this influenced Woodhouse J's determination that judicial review was appropriate. Had the Foundation sought review on a ground that is more difficult to prove, such as unreasonableness, the matter may not have so strongly pointed towards the need for judicial review. The desire to remedy what he could see to be a breach appears to have helped persuade Woodhouse J that the decision needed to be justiciable.

C Analysis of the Decision

Justice Woodhouse considered himself bound by *Lab Tests* and endeavoured to follow it. Despite this, in my opinion his decision does not follow *Lab Tests'* approach. The Ministry has begun proceedings in the Court of Appeal so it is unclear whether Woodhouse J's decision will stand.[75] Nonetheless, it is still important to assess the merits of Woodhouse J's decision as he provides a new approach to dealing with government tendering decisions. In this section I will

[66] At [218].
[67] At [274].
[68] At [283] to [286].
[69] At [287].
[70] These rules are laid out at [287] to [291].
[71] At [314].
[72] At [314].
[73] At [339]
[74] At [340] to [341].
[75] The appeal was heard in early August 2016 but, at the time of writing, the Court of Appeal has not released its decision.

outline why I believe Woodhouse J was not following *Lab Tests* and the major differences in the two approaches.

1 Did Woodhouse J follow the approach in Lab Tests*?*

(a) The *Lab Tests* approach

The Court of Appeal in *Lab Tests* followed the approach taken by the Privy Council in *Mercury Energy.* The Privy Council held that decisions to enter into a commercial contract are not likely to be subject to judicial review in the absence of fraud, corruption or bad faith.[76] *Mercury Energy* related to a decision by a State Owned Enterprise (SOE) and the Privy Council made clear that they were referring only to decisions by an SOE.[77] *Lab Tests* interpreted *Mercury Energy* as a general proposition for all public bodies, choosing to apply it to a DHB. The Court emphasised that judicial review was generally not an appropriate mechanism for dealing with government contracting decisions because of the need for government bodies to take a competitive commercial approach towards tendering.[78]

The *Lab Tests* approach is based on the proposition that commercial contracting decisions will very rarely be reviewable because they are essentially private decisions, despite being made by a public body.[79] This reflects the general trend of judicial review to consider not just the body making the decision and the source of its power, but the nature of the decision itself and its consequences.[80]

(b) The *Problem Gambling* approach

Problem Gambling clearly does not take such a limited approach to judicial review of contracting decisions: Woodhouse J allowed review of the Ministry's decision, despite the situation not falling into any of the categories outlined in *Lab Tests*. Justice Woodhouse identifies the emphasis on the statutory context of the decision made by the majority directly after their reference to these categories.[81] He therefore interprets *Lab Tests* as establishing that contextual factors will determine whether a particular commercial decision is sufficiently public in nature to permit judicial review. Justice Woodhouse decided that the Ministry's decision was reviewable based upon consideration of contextual factors mentioned in *Lab Tests*.[82] He claimed to distinguish *Lab Tests* on the facts of the case, not the approach taken.[83]

However, while Woodhouse J uses factors and statements in *Lab Tests* to shape how he approached the issue before him, his approach is fundamentally different from the Court of

[76] At 391.
[77] At 391.
[78] At [60].
[79] *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [JAInto.04(b)]. See *Lab Tests*, above n 2, at [60].
[80] Philip A Joseph *Constitutional and Administrative law in New Zealand* (4th edition, Brookers Ltd, Wellington, 2014) at 22.6.1. See *Lab Tests*, above n 2, at [85].
[81] *Problem Gambling*, above n 1, at [58]-[61].
[82] *Problem Gambling*, above n 1, at [58].
[83] For example at [89] and [98].

Appeal's. *Lab Tests* held that government tendering decisions are unable to be reviewed unless a particular ground is present, but *Problem Gambling* begins by looking at the context of the decision and uses that to determine reviewability. *Lab Tests* assumes that government tendering decisions are private, while *Problem Gambling* looks at the individual context to determine that issue.[84] Justice Woodhouse felt compelled to extend the limited range of grounds found in *Lab Tests* because of "the public interest context of the decision" before him.[85] He was concerned to remedy what he saw to be breaches and extended the position of *Lab Tests* to enable him to do that.

2 Which approach is preferable?

Faced with two different approaches to government tendering decisions, the issue becomes deciding which is superior. Answering this question is my focus in this dissertation. In order to help compare the goals of the two approaches and how effective each is, I will consider them against three sets of criteria.

The first of these are judicial review's normative aims. These aims provide an explanation of judicial review's purpose and what it is designed to achieve. Looking at these normative aims will reveal whether reviewing government tendering decisions is part of what judicial review is designed for. Analysing how each approach reflects these aims will be a key consideration in determining which is more legitimate.

The second criterion considered will be the public-private divide. As the traditional method for determining reviewability, it is a further guide to the legitimacy of each approach. However, this criterion will be shown to be of limited usefulness. It has been seen already that *Lab Tests* and *Problem Gambling* differ in how they conceive of the nature of government tendering decisions. I will investigate whether *Lab Tests* was correct to categorise all government tendering decisions as private. Understanding the nature of the decisions is crucial because it indicates whether judicial review, a public law action, is appropriate. Knowing their nature reveals "whether to apply private law principles, public law principles, or some admixture of the two."[86]

The third set of criteria focuses on the effectiveness of the two approaches at achieving justice. I will consider fairness and certainty as two routes to achieve justice, and consider how the two

[84] Justice Woodhouse did not consider the fact that the decision-maker in *Problem Gambling* was a government department as sufficient to result in the decision's reviewability (at [92]). Therefore he is not limiting his structured contextual approach to government tendering decisions, and it could be used for determining whether or not any contracting decision made by a public body should be reviewed. However, my dissertation will remain focused on government tendering decisions specifically. It will also not speak to whether judicial review is available for the exercise of powers under a contract or a breach of that contract. Such post-formation cases do not tend to involve issues that judicial review is concerned with and are based far more on the interpretation of the particular contract, a matter better dealt with by the private law.
[85] *Sim's Court Practice* (online looseleaf ed, LexisNexis) at [J72A3.4(E)].
[86] At [353].

approaches balance the need for each. The approach which can better utilise these values and be more effective at making just decisions in the majority of circumstances will be preferable.

Taken together, these criteria should provide a detailed analysis of the goals of the two approaches, how they work and how effective they are. They will be help gauge the legitimacy and efficacy of each approach. The approach which more fully reflects these criteria will be the one best suited to deal with judicial review of government tendering decisions.

III Theoretical Grounds for Comparing the Two Approaches

In this chapter I will outline the first two sets of ideas in order to help explore the purposes and methods of judicial review. I will then use those concepts to compare the *Lab Tests* and *Problem Gambling* approaches and determine which is preferable. Before delving into those I will elaborate on the concepts of jurisdiction and justiciability in order to clearly distinguish how the two approaches work.

A Justiciability v Jurisdiction

Justiciability and jurisdiction are the two hurdles that must be overcome by applicants before a Court will consider engaging in judicial review.[87] This distinction is important when comparing the approaches taken in *Lab Tests* and *Problem Gambling* and in assessing the best way to determine whether a government tendering decision should be subject to review. Although the difference between them is relatively straightforward in theory, in practice the two concepts are often confused. Some judges fail to clearly distinguish which concept they are discussing or overlook the differences. The confusion is exacerbated by the use of different terms for each concept. I will clarify the distinction and then use it to compare the two approaches.

1 The difference between the concepts

The basic difference is that 'jurisdiction' asks whether a decision *can* be reviewed, while 'justiciability' asks whether the decision *should* be reviewed. "Jurisdiction identifies the court's *power* to intervene in judicial review, while justiciability identifies the *appropriateness* to intervene".[88]

Jurisdiction is broader than justiciability. In New Zealand it is determined by section 4 of the Judicature Amendment Act 1972 or through the prerogative writs available under Part 30 of the High Court Rules.[89] The Act gives an expansive approach to determining which bodies' decisions are potentially subject to judicial review.[90] Determining whether a decision is subject to the jurisdiction of the court is relatively straightforward and focuses on the source of the decision.

The question of justiciability is more subjective and fluid. Joseph notes that justiciability has changed over time "in accordance with changing social expectations and [the court's] own perceptions of what… judicial responsibility required."[91] The justiciability inquiry is answered by looking at the subject matter of the decision and deciding whether it is appropriate to be judicially reviewed. In doing so, the court imports the principle of deference by recognising

[87] This was noted by the Supreme Court in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62 at [1]*:* "even if the court has jurisdiction, the exercise of power must be one that is appropriate for review".
[88] Joseph, above n 80, at 22.51 (emphasis in original).
[89] GDS Taylor *Judicial Review: a New Zealand perspective* (3rd edition, LexisNexis NZ Limited, Wellington, 2014) at 5.07.
[90] Joseph, above n 80, at 27.5.1.
[91] At 22.51.

that there are constitutional and institutional limits to their ability to utilise judicial review.[92] The key concern when determining justiciability is whether the issue is one which should properly be determined by the court.[93] This depends on the nature of the decision and the ground of review.[94]

2 Why the difference is important

It is important to establish the distinction between the two concepts because a review may be refused based on a failure to overcome either hurdle.[95] Cassie and Knight note that a court may refuse to review a government tendering decision on the basis of two reasons:

1) The court declines to review the decision because it determines that the private nature of the decision means the court has no jurisdiction to review it.
2) While the court determines that it has jurisdiction to review the decision, it declines to review the decision based on it being non-justiciable.[96]

These two reasons may have the same practical result but are based on very different theoretical concerns. Knowing why a court declines to review a decision is important for critiquing the court's reasoning and understanding the limits of judicial review.

Cassie and Knight suggest that first approach to jurisdiction is based on a functional perspective; where the decision's subject matter is the focus.[97] The commercial nature of government tendering decisions means that they are private in nature and therefore cannot be reviewed. The second approach is based on an institutional perspective: the focus is on who is making the decision.[98] Government tendering decisions are made by the government and the court has jurisdiction to supervise government decisions. However, review of government tendering decisions can be declined at the second hurdle of justiciability if the court considers that their commercial nature makes them non-justiciable.

The institutional approach to jurisdiction is more appropriate because it reflects a consideration of the court's power to intervene. There is no danger in having a broad test at this stage, because any decision still has to pass the justiciability test. The latter is designed to look at the subject matter and whether it should be reviewed. Judges who take a functional approach to jurisdiction risk conflating the two tests into one. As both serve a distinct purpose, it is important to keep them as separate tests focusing on different aspects of a decision.

[92] Joseph, above n 80, at 22.51.
[93] James Palmer and Kate Wevers "Judicial review in a commercial context" [2009] NZLJ 14 at 15.
[94] Palmer and Wevers, above n 93, at 15.
[95] Jeannie Cassie and Dean Knight "The Scope of Judicial Review: Who and What may be Reviewed" in *Administrative Law Intensive* (New Zealand Law Society seminar booklet, 2008) at 63 at 84.
[96] At 84.
[97] At 84.
[98] Cassie and Knight, above n 95, at 84.

3 How Lab Tests *and* Problem Gambling *dealt with this distinction*

(a) *Lab Tests*

The *Lab Tests* approach separates out the questions of jurisdiction and justiciability. It was not disputed that the DHB's power to enter into a contract under its empowering statute "was, in principle, subject to review".[99] Instead, the dispute was over the scope of review.[100] Although not using the same language, this shows that the Court was alive to the difference between jurisdiction and justiciability. The Judicature Amendment Act clearly covered the decision as it was made under a statutory power, meaning the Court had sufficient jurisdiction to review the decision. This left the question of whether the decision was justiciable. The Court of Appeal answered this in the negative, putting their decision in the second of Cassie and Knight's categories above.

The general approach of *Lab Tests* is that while there is jurisdiction to judicially review government tendering decisions, the commercial subject matter means that these decisions are non-justiciable. As noted above, the justiciability inquiry is intended to focus on the subject matter of the decision itself. However, the *Lab Tests* approach also looks at the grounds pleaded. The Court of Appeal accepted that despite a general preclusion, if the claim involves fraud, corruption, bad faith or analogous situations, a government tendering decision is justiciable.[101] Therefore it is the grounds pleaded that determine justiciability. This approach runs contrary to the accepted conception of justiciability. Justiciability is determined by considering the type of decision in question, which then indicates whether it is justiciable or non-justiciable. However, the Court of Appeal determined that government tendering decisions were justiciable when certain grounds were pleaded, but non-justiciable on other grounds. If the commercial nature of government contracting decisions makes them private in nature, it would have been more appropriate for the Court to decide that they were not justiciable under any circumstances. *Lab Tests* uses a mid-way category of 'sometimes justiciable', contrary to the established position that the subject matter of a decision is either justiciable or non-justiciable.

The Court gave no reasons why the particular grounds of fraud, corruption and bad faith somehow make the decision public and thus justiciable. Taggart argued that these grounds are "so extremely narrow and so rarely made out that subjecting contract decisions by [public bodies] to judicial review on those grounds alone is a hollow gesture."[102] Although *Lab Tests* theoretically allows government tendering decisions to be reviewed, in practice it would be a very rare to find a suitable situation. If the Court thought that government tendering decisions are unsuitable for review, then its refusal to judicially review them should cover all contexts. It is unclear why the Court of Appeal thought that these limited contexts alone could be

[99] At [23].
[100] At [23].
[101] At [91].
[102] Michael Taggart "Corporatisation, contracting and the courts" [1994] PL 351 at 357.

reviewed given that there are many other ways that a decision may be flawed. *Lab Tests*' hybrid approach of 'sometimes justiciable' is not conceptually sound because it overlooks the binary answer required by the justiciability inquiry.

(b) *Problem Gambling*

In *Problem Gambling*, Woodhouse J also recognises that the decision of the Ministry is within the Court's jurisdiction and identifies justiciability as the issue.[103] Justice Woodhouse's approach is to determine the justiciability by reference to the decision's specific context.[104] This is done by considering a range of factors including the nature of the decision (whether it was public or private), any relevant contractual provisions and the nature of the complaint. Unlike *Lab Tests*, where the grounds pleaded were the ultimate factor in determining justiciability, in *Problem Gambling* this was just one of a range of important factors in assessing justiciability. Justice Woodhouse used these factors to determine that the Ministry's decision was justiciable. Therefore it could be "subject to the full scope of review".[105] It was justiciable regardless of the specific ground of review pleaded. This is more conceptually sound than allowing a decision which is otherwise non-justiciable to be reviewed on certain narrow grounds. Justiciability is a binary decision: a decision is either suitable to be reviewed or not. The *Problem Gambling* approach gives effect to this and is therefore more appropriate than *Lab Tests*' use of a midway ground. *Problem Gambling* takes a more principled approach to determining justiciability by considering wider contextual factors, rather than arbitrarily limiting judicial review of government tendering decisions to a narrow set of grounds.

(c) Conclusion

Problem Gambling's approach is more in keeping with the understanding of justiciability outlined above because it focuses on the context of the decision and its subject matter. It provides greater guidance for future courts when deciding questions of justiciability. When *Mercury Energy* held that contracting decisions could be reviewed for fraud, corruption or bad faith, it gave no reasons why the decision was justiciable for the purposes of these grounds in particular. This left *Lab Tests* able to extend the grounds to analogous situations, again without justification. Judges can continue to extend this approach to cover other grounds, as Woodhouse J claimed to do, which is not what the Privy Council intended. In attempting to clarify the position of *Lab Tests* and relate it to the situation before him, Woodhouse J distilled a variety of contextual factors from the Court of Appeal's judgments. The result was the creation of a structured contextual approach to justiciability. The approach is contextual because it looks at the particular circumstances to decide whether a decision is justiciable or not. The approach is structured judges must consider a list of relevant factors, thus structuring the decision-making process instead of it being an instinctual reaction to the situation.

[103] At [9].
[104] At [65].
[105] At [10].

Furthermore, judges are required to explain the factors behind their decision, providing guidance for future courts.

4 Non-justiciability

Lab Tests and *Problem Gambling* arrived at different conclusions about whether government tendering decisions were justiciable. Determining which approach is more accurate therefore largely depends on an analysis of whether government tendering decisions are justiciable or non-justiciable. A classic New Zealand description of non-justiciability is found in *Curtis v Minister of Defence*.[106] Justice Tipping held that "a non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved" and that this "situation will often arise in cases into which it is also constitutionally inappropriate for the courts to embark."[107] When a court decides an area is non-justiciable, it acknowledges that the decision involves a matter beyond its expertise or mandate.[108] *Lab Tests* decided, following the previous position, that government tendering decisions were non-justiciable because of their inherent commercial nature. However, Woodhouse J did not consider government tendering decisions to be non-justiciable merely due to the presence of a RFP.[109] This is a change in position but, as Joseph noted, what is considered justiciable does change over time.[110]

In order to determine the appropriateness of considering government tendering decisions justiciable, I will look at the normative purposes of judicial review and the idea of the public-private divide. Both of these criteria provide a means of understanding whether a type of decision should be justiciable. The two focus on different concerns relating to judicial review and are therefore useful for highlighting a variety of aspects in the *Lab Tests* and *Problem Gambling* approaches, and for demonstrating how they diverge. The goal of this analysis is to help conclude which approach to justiciability is preferable in the government tendering context.

B Normative Aims: How to Evaluate the Options

An analysis of the normative aims of judicial review is key when determining issues such as the scope of review. "If courts do not have a clear vision of the purposes of judicial review, it is hardly surprising that they struggle to decide in a principled and consistent fashion what sort of decisions should and should not be susceptible to review."[111] Properly evaluating the *Lab Tests* and *Problem Gambling* approaches therefore requires analysing them against these normative aims. The approach which better reflects them is preferable as it furthers the purpose of judicial review. However, New Zealand case law and commentary go into little depth on

[106] *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA).
[107] At [27].
[108] Joseph, above n 80, at 22.51.
[109] At [87].
[110] At 22.51.
[111] Mark Elliot "Judicial Review's Scope, Foundations and Purposes: Joining the Dots" (2012) NZLR 75 at 75-76.

what these aims are. In order to flesh them out, I will consider Mark Elliot's elaboration of judicial review's purposes and justifications.

1 The normative aims

Judicial review's aims were not largely expounded within early case law. De Smith notes that the courts saw the aim of judicial review as being "the promotion of 'good public administration'".[112] However, "the qualities of 'the good' in public administration were not grounded in any clear theoretical or constitutional foundation".[113] This is unhelpful for present courts who need a clear understanding of judicial review's aims in order to determine which decisions should be reviewed. This lack of clarity has contributed to the existence of different answers about whether government tendering decisions are justiciable. This accords with Elliot's analysis that current jurisprudence on the scope of review is "largely incoherent or, at best, inadequately elaborated".[114]

Reflecting the lack of such analysis in case law, New Zealand commentaries in the area do not focus on judicial review's justifications. Taylor describes judicial review as a common law method through which the courts make an assessment on how to ensure the rule of law within society and to "'control, 'supervise' and 'keep with their legal limits' the activities of [various] entities".[115] By doing this, "the courts are impliedly claiming to implement the 'will' of the public" and judicial review's legitimacy comes from the public's confidence in it.[116] Joseph focuses on judicial review's "inherently discretionary" nature and that it "cannot be reduced to formulaic rules for producing predictable and mechanical outcomes".[117] He views judicial review as a means for courts to consider whether something has gone wrong in a decision-making process that requires their intervention.[118] Elliot gives an alternative explanation of the justification for judicial review, focusing on proposed normative purposes for it. He provides an interesting argument for why these should guide judicial review. I will use his proposition to draw out some of the differences between *Lab Tests* and *Problem Gambling*'s approaches and to help determine which is preferable.

2 Elliot's aims of judicial review

In his article *Judicial Review's Scope, Foundation and Purposes,* Elliot suggests three central aims of judicial review after analysing the New Zealand context. He argues that "judicial review exists in order to ensure (and is justified by the normative importance of ensuring) compliance with the rule of law."[119] Judicial review achieves this by ensuring that the executive

[112] Harry Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at 1-015.
[113] Woolf, above n 112, at 1-015.
[114] At 75.
[115] Taylor, above n 89, at 1.01.
[116] Taylor, above n 89, at 1.01.
[117] At 22.4.1.
[118] At 22.4.1.
[119] At 78.

does not use its legal powers to interfere improperly with the liberty and rights of citizens.[120] Elliot further claims that judicial review is required because "[a] special regime of legal control is necessitated by the *uniqueness of government's position*".[121] Other legal actions or tools are not sufficient to properly achieve the goal of ensuring that the state abides by the rule of law.

Finally, Elliot claims that judicial review exists "to secure the *public interest in good governance*: the public is entitled to expect that governmental decisions will accord with standards of good administration, and judicial review exists, in part, to provide redress when such standards are not met".[122] He notes that the extent to which this factor justifies making judicial review available depends in part upon the extent to which other mechanisms for securing that interest are available, and how effective they are.[123] He argues that this last principle justifies and requires the extension of judicial control over all government functions:

> whether or not these functions are undertaken pursuant to the exercise of legal powers, and whether or not they are undertaken by institutionally governmental actors. Recognising that judicial review's legitimate purview extends to such situations is crucial if the realities of the modern state- in which governmental business is increasingly transacted by non-traditional means- are to be adequately accommodated.[124]

These normative aims provide a guide for determining if and how judicial review should expand and why certain decisions are justiciable.[125]

3 Impact on tendering decisions

Elliot's suggested aims suggest that the mere presence of a tendering or a contractual aspect in a decision is an insufficient reason to prevent it being reviewed.[126] On this basis, Elliot criticises the approach taken in *Mercury Energy* (and *Lab Tests*) that views "the existence of contractual arrangements as either displacing judicial review entirely, or severely limiting it."[127] He argues that this arbitrarily restricts judicial review and "pays inadequate regard to the normative factors that justify and require judicial review in the first place".[128] The mere fact that the government chooses to conduct its business by contract should not remove the public's interest in good governance. The government's use of contracts, like any other decision it makes, still has the power to affect a variety of public and individual interests.[129]

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[120] Elliot, above n 111, at 79.
[121] At 79 (emphasis in original).
[122] At 80 (emphasis in original).
[123] At 80.
[124] At 81.
[125] One issue with looking to normative aims is, as Justice Hammond notes in *Lab Tests* at [378], that they "fail to drill down far enough enable respectable advice to be given to parties who are supposed to abide by the law." Nonetheless they cannot be forgotten as they provide important guidance to courts when making overarching decisions about how to shape the law. The next step would be to distil these purposes down into more practical guidance for both courts and parties. However, I do not seek to carry out this task within this dissertation.
[126] Elliot, above n 111, at 102.
[127] At 104-105.
[128] At 105.
[129] Sue Arrowsmith "Government contracts and public law" [1990] 10 Legal Studies 231 at 231.

Those commentators who argue that contractual powers are not justiciable point out that it is a power also shared by private individuals, and contracts are entered into by parties voluntarily.[130] However, Arrowsmith suggests that this does not take away from the need to protect the public interest and maintain confidence in the government.[131] She does not ignore the need of government to be able to compete with private businesses, but suggests that this does not arise directly from the contractual nature of the decision.[132] Although a commercial setting may require a court to limit how the decision is reviewed, she does not consider it sufficient to exclude all government contracting decisions from review.[133] "Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress" because we hold public bodies to a higher standard.[134]

Judicial review is necessary because of the government's unique position. This should extend to its actions under contract as well. "[S]tricter duties imposed on public authorities by administrative law are justified because of the disparity in power between public and private actors".[135] There are very few other means to control government action in this realm. As Cane notes:

> the common law has never developed any principle allowing parties to a contract to obtain relief from what may be seen as unfair consequences of inequality of bargaining power. Government has very considerable bargaining power both by reason of its constitutional and economic strength and because government contracts are often valuable and long-term. This power may enable it to secure more favourable terms and conditions than any private contractor could obtain.[136]

A lack of alternative routes to receive a remedy generally supports the availability of judicial review.[137] Therefore, the fact that government has very little supervision or requirements placed on it when making these important decisions indicates that they need to be justiciable. This is especially necessary given the increasing trend of government to use contracts as a means to fulfil its obligations and even as a regulatory method.[138] The government's role does not change when it uses contractual methods so judicial review is still needed to monitor it.

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[130] Daniel Stewart "Statutory Authority to Contract and the Role of Judicial Review" (2014) 33(1) UQLJ 43 at 44.
[131] Arrowsmith, above n 129, at 239; Sue Arrowsmith *The Law of Public Utilities Procurement* (Sweet & Maxwell, London, 2005) at 35.
[132] Arrowsmith, above n 129, at 239.
[133] Arrowsmith, above n 129, at 239.
[134] *R (on the application of Molinaro) v Kensington RLBC* [2001] EWHC Admin 896; [2002] LGR 336 at [69].
[135] Anthony Wicks "A Private Law Issue in "Public Law Drag?": Government Contract Award Processes and Judicial Review in New Zealand" (2009) OYLR at 27.
[136] Peter Cane *Administrative* Law (5th edition, Oxford University Press, Oxford, 2011) at 229 (footnotes omitted).
[137] Woolf, above n 112, at 3-056.
[138] Arrowsmith, above n 129, at 233; Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (Oxford University Press, Oxford, 2006) 124 at 125.

Furthering these normative aims would require widening judicial review's scope. Elliot argues that this is desirable because it would allow for the public law to respond to changes in the nature, form and techniques by which governments exercise their roles.[139] Otherwise the law may be out-manoeuvred simply by government's use of non-traditional means, such as contracting.[140]

4 Application to Lab Tests *and* Problem Gambling

(a) *Lab Tests*

Justice Hammond accepted that the Judge's task in judicial review was to ensure that the government stayed within the powers granted to them by law,[141] and to guard against abuses of power.[142] This is effectively enforcing the rule of law, so he would agree with the first of Elliot's propositions. However, he disapproved of the idea that judges have "an independent capacity to intervene by way of judicial review to restrain the abuse of power and to secure good administration."[143] The majority also rejected the submission that a decision is justiciable based on a "material departure from accepted public sector ethical standards".[144] They did not accept that the court has a role in ensuring "good hygiene in public decision-making" because the issues presented before them were too complex to be dealt with by judicial review.[145] The Court's approach does not fulfil the second and third of Elliot's aims for judicial review.

The Court of Appeal took this approach because it was concerned that the judicial review process, which is designed to be simple, was unsuited for the complex questions involved in a contractual dispute.[146] Mullan notes that it was very cautious about courts exercising a role as "the guardian of integrity, probity, and good administration" because this would be getting to close to imposing statutory-like obligations on public bodies.[147] The Court was wary of exceeding its constitutional role.[148]

The Court of Appeal was not ignoring the public interest, but it had a different conception of that what that interest was. It believed the public interest is best served by allowing public entities to engage in commercial negotiations, which requires a limit on the extent of their public law obligations.[149] The *Lab Tests* approach views contract law as sufficient for ensuring the government's compliance with the rule of law. Therefore the special regime of judicial review is unnecessary.

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[139] At 111.
[140] At 111.
[141] At [363].
[142] At [373].
[143] At [367].
[144] At [92].
[145] At [343].
[146] *Lab Tests*, above n 2, at [342]-[343].
[147] David Mullan "The State of Judicial Scrutiny of Public Contracting in New Zealand and Canada" (2012) 43 VUWLR 173 at 197-8.
[148] At [343].
[149] At [88].

(b) *Problem Gambling*

Elliot suggests that his "three interlocking foundations of judicial review" can help develop a test for whether a decision is justiciable.[150] This test is not a simple yes or no, but a list of criteria that are weighed against each other and against conflicting policy factors to determine whether a particular decision is appropriate to be judicially reviewed.[151] The factors he suggests are: the nature of the power being exercised;[152] the applicable grounds and intensity of review;[153] the terms of any relevant legislation;[154] the nature of the interest at stake;[155] the constitutional and institutional appropriateness of judicial review;[156] the institutional nature of the decision-maker;[157] and the nature of the function being performed.[158] These are very similar to the factors Woodhouse J used in *Problem Gambling*.[159] Justice Woodhouse was strongly influenced by the need to ensure that the Ministry had made its decision properly and knew judicial review was the only way the Foundation could bring these matters before a court.[160] *Problem Gambling* recognises that judicial review of government tendering decisions can be in the public interest. If the objective in a procurement is to ensure the integrity of the bidding system, there is room for taking into account public interest considerations that impact the government's particular role and responsibility.[161]

(c) Conclusion

Problem Gambling's approach better fulfils Elliot's conception of judicial review's aims as it is more open to utilising the special regime to ensure the government's compliance with rule of law. Justice Woodhouse recognised that review of tendering decisions is necessary to ensure they are made according to the standards of good administration. Because contracting decisions have become a major route by which the government carries out its duties, the public has an interest in ensuring they are made properly. Judicial review is the only method available to the courts to effectively supervise these decisions in this way.

The desirability of applying Elliot's aims assumes that the public has an interest in regulating tendering decisions made by the government. However, other theorists conceive of commercial decisions as a purely private matter and suggest that the public interest is best served by leaving the government alone to carry them out. *Lab Tests* reflects this latter idea. It prioritises commercial concerns over normative ones, and places its confidence in contract law's ability

[150] At 83.
[151] Elliot, above n 111, at 83.
[152] At 83.
[153] At 84.
[154] At 84.
[155] At 84.
[156] At 84.
[157] At 86.
[158] At 87.
[159] His criteria are also similar to those laid out by Stratas JA in the Canadian case *Air Canada v Toronto Port Authority* 2011 FCA 347 at [60].
[160] At [109].
[161] Mullan, above n 147, at 202.

to constrain government misdemeanours. The appropriateness of this approach depends on where government tendering decisions sit on the public-private divide.

C The Public-Private Divide

Government bodies will always be considered public bodies, but the contracting decisions they make may be of a public or a private nature. Decisions which involve governments engaging in an activity in the same way that a citizen does are considered private. For example, a government department may engage in a contract with an IT company to provide and maintain computer equipment. This is a private decision because it is a commercial transaction of the kind any individual could enter into.[162] It is "quintessentially a low level contracting decision".[163] However if a decision has a greater policy content and is part of the government's role– and *not* a decision a private citizen could make – it tends to be public in nature.[164] Examples of public decisions include the government granting a visa or a local council determining what zone an area should be.

Determining the place of government procurement decisions on this public-private spectrum is not straightforward. The Court in *Lab Tests* was not willing to allow judicial review of the DHBs' tendering decision because it viewed the decision as being of a private nature.[165] However, in *Problem Gambling,* Woodhouse J considered that the Ministry's tendering decision was public in nature.[166] Their divergence illustrates that the divide between public and private decisions is a hazy one. The unhelpfulness of the divide has led some theorists to reject it as a test and argue for a more fluid approach. Nonetheless, it is worth considering how the public-private divide impacts on determinations of whether government contracting decisions should be justiciable.

1 The public-private divide and the place of contractual decisions

Public law's outer limits "have traditionally been set by the public/private divide".[167] Constitutional or administrative matters are considered public and dealt with by public law. Meanwhile situations involving matters such as contract or tort are left to private law, regardless of the involvement of a public law entity. This goes back to Dicey's principle that everyone, including the government, should be subject to the same rules.[168] However, the governmental landscape has changed dramatically since this approach was developed.[169] As

[162] Janina Boughey and Greg Weeks "'Officers of the Commonwealth' in the Private Sector: Can the High Court Review Outsourced Exercises of Power?" [2013] 36(1) UNSWLJ 316 at 320.
[163] *Bayline Group Limited v The Secretary of Education* [2007] NZAR 747 at [30].
[164] *Bayline*, above n 163, at [30]; Boughey and Weeks, above n 162, at 320.
[165] At [405].
[166] At [88].
[167] Chris Finn "The concept of 'justiciability' in administrative law" in Matthew Groves and HP Lee *Australian Administrative Law: Fundamentals, principles and doctrines* (Cambridge University Press, Cambridge, 2007) 143 at 144.
[168] Joseph, above n 80, at 22.2.2.
[169] This approach was developed in the late nineteenth century with the first edition of Dicey's treatise on this subject (*Introduction to the Study of the Law of the Constitution*) being released in 1885.

Lab Tests noted, changes in the public sector's structure have resulted in an increased use of contracting by government.[170] Much of the work previously done by the public sector is now performed by the private sector.[171] The boundaries between public and private law have become murkier. Writing prior to *Lab Tests,* Taggart saw *Mercury Energy* as a failed chance for the courts to properly confront this issue and deal with the public-private divide.[172]

Taggart noted that administrative law has persistently immunised contractual matters from judicial review because of the mindset created by Dicey's primacy of private law.[173] The importance placed by the common law on freedom of contract has made courts hesitant to consider the area justiciable.[174] Government contracting decisions are classified as private because contracting is a power private persons can utilise and it is subject to private law norms and means of enforcement.[175] Furthermore, individuals enter into contracts and are subject to their obligations "based on their own consent rather than the coercive power of the state".[176] However, "the role of government in the expenditure of public funds [is] substantively different from consensual arrangements entered into by non-government persons."[177] A government should not be able to abuse its power simply "by invoking the principle that private individuals can act unfairly or abusively without legal redress".[178] Government contracting decisions need to comply with public law standards to prevent the government from being able to abuse its power in such a manner. The justification for holding the government to a higher standard than private bodies is because it has greater powers and responsibilities to the public.[179]

The majority's approach in *Lab Tests* does not allow judicial review of government contracting decisions because it determined that these matters should be governed by contract law.[180] This reflects judicial review's role as a remedy of last resort.[181] Judicial review is seen as unnecessary when another field of law governs the situation: contractual disputes are left to contract law.[182] However, there is no reason why a decision which is subject to private law cannot also be governed by public law.[183] Arrowsmith argues that:

> It is appropriate to apply such principles in both because of the public interests involved and also because even where it is exercising these types of functions, a public body should be held

[170] At [19]-[20].
[171] At [20].
[172] Taggart, above n 102, at 358.
[173] At 358.
[174] Sharron Mahon "Judicial Review of Crown Procurement Decisions: Available or Not?" [2011] J. Can. C. Construction Law. 287 at 290.
[175] Stewart, above 130, at 44.
[176] Woolf, above n 112, at 3-056.
[177] Stewart, above 130, at 48.
[178] *Molinaro*, above 134, at [69].
[179] SH Bailey "Judicial Review of Contracting Decisions" [2007] PL 444 at 451.
[180] See Hammond J's comments [359] and [405].
[181] Woolf, above n 112, at 3-056.
[182] Woolf above n 112, at 3-056.
[183] Arrowsmith, above n 129, at 244; Woolf, above n 112, at 3-056. In Janet McLean "Convergence in Public Law and Private Law Doctrines- the Case of Public Contracts" [2016] NZLR 5 at 5-7, McLean discusses the historical precedence for both public and private law applying to a matter.

> to the high standards of treatment of citizens which are imposed in the exercise of other, peculiarly "governmental" powers. The fact that the relationship of the parties is affected to some degree by private law does not make it inappropriate to apply public law in addition alongside that law.[184]

While private law may act as the primary vehicle for resolving contractual disputes with government, the desirability of this does not prevent judicial review being used as a secondary means when private law is unable to address a legitimate concern. The government is not an ordinary citizen. It is different in nature, so the special regime of judicial review may be needed to properly solve a dispute against it. Decisions made by the government in this sphere "cannot be treated as purely in the realm of contract".[185] Arrowsmith argues that "the law should seek to achieve a degree of legal regulation which takes appropriate account of the special interests involved in this activity, and should not assume too readily that it is an activity which is properly beyond the scope of 'public law'."[186] Contractual remedies are unsuitable for addressing issues such as unfairness, unreasonableness or natural justice, leading plaintiffs to seek judicial review instead.[187] These principles need to enforced in government contracts in order to protect the public interest and keep governments accountable. Intervention is justified because of the public features present.

2 Application to Lab Tests *and* Problem Gambling

(a) *Lab Tests*

The Court of Appeal did not appear to require much proof of a commercial context to exclude judicial review. They noted that the objectives in the DHBs' empowering statute[188] were public in nature, not commercial.[189] However, the requirements on DHBs to perform their functions efficiently, act in a 'financially responsible manner' and recover all their costs were considered sufficient to create a commercial context.[190] The DHBs were not required to carry out a competitive tendering process, just to 'negotiate and enter into' service agreements.[191] The Court was concerned that procedural obligations would unduly fetter the DHBs' ability to negotiate.[192] The need for the DHBs to act in a commercial way suggested to the Court that "implied duties were limited and would not be supplemented by means of a public law analysis".[193] The *Lab Tests* approach considers that a commercial context means that a decision is private, and therefore beyond the scope of the public law.

[184] Arrowsmith, above n 131, at 36.
[185] Cooke and Jefferies JJ in *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA) at 650.
[186] Arrowsmith, above n 129, at 244
[187] Cassie and Knight, above n 95, at 86.
[188] The New Zealand Public Health and Disability Act 2000.
[189] At [76].
[190] At [77]
[191] At [78].
[192] At [78].
[193] At [60].

(b) *Problem Gambling*

Problem Gambling's approach means the justiciability of government contracting decisions is determined by considering specific contextual factors. These factors point to whether or not the particular decision should be categorised as public or private. This is a more nuanced approach to the public-private divide as it does not assume any decision involving a contract is necessarily of a private nature. It is important to note that *Problem Gambling*'s structured contextual approach would not subject every government tendering decision to review. There may be contextual factors which point towards it being a private commercial decision, and therefore non-justiciable.

3 The artificiality of the divide

The public-private divide has been the traditional method for analysing the justiciability of decisions. However the limited binary classifications it offers has lead a number of authors to argue that it is artificial and that other criteria are better indicators of justiciability. Cassie and Knight argue that the assessment of whether a decision is public or private is "inherently a value judgment".[194] Different people will view what constitutes 'privateness' or 'publicness' differently, as demonstrated in the divergence between the *Lab Tests* and *Problem Gambling* approaches. Therefore these authors suggest that searching for some 'public factor' is undesirable because the results are not objective. Concern with whether a decision is public or private can obscure and conceal the real issues.[195] Instead of arguing over the boundaries of a theoretical divide, it is more helpful to focus on "fashion[ing] new standards of scrutiny for contemporary modes of policy delivery."[196] This is achieved by bringing the discussion back to the aims of judicial review. "The more meaningful inquiry is a normative one- is the decision one which should be subject to public law principles?"[197] The important point is "not whether particular functions are public or private but about whether accountability for the performance of particular functions should follow public or private law rules and principles."[198]

McLean suggests that the answer is to bring together public and private law doctrines.[199] These will "take into account the nature of markets, contractors, third party beneficiaries and the public interest" so they are more useful than "blunt determinations of 'publicness'."[200] She argues that "[r]ather than relying on an a priori categorisation of whether a tender is "commercial" or "public" in nature, the standards of scrutiny should be contextualised by reference to the competitive and statutory background."[201] *Problem Gambling*'s approach reflects McLean's suggestion to incorporate context. Justice Woodhouse's use of a large range

[194] At 65.
[195] Arrowsmith, above n 129, at 244.
[196] McLean, above n 183, at 8.
[197] Cassie and Knight, above n 95, at 68.
[198] Cassie and Knight, above n 95, at 68-69.
[199] McLean, above n 183, at 8.
[200] At 8.
[201] At 18.

of contextual factors ensures the focus is on the particular issues at play and tries to determine whether or not these issues need to be resolved by judicial review. If they do, the decision is justiciable. However the factors may also point towards contract law as the most appropriate vehicle.

By using a list of factors, *Problem Gambling*'s structured contextual approach brings more transparency: the judge is forced to justify his or her conclusion on justiciability by providing reasons for that outcome. This gives more information to the parties involved. It is much easier to critique and decide to challenge a decision on appeal when the judge has provided specific reasoning, rather than when the judge has decided based on his/her own sense of how significant the public context is.[202] *Problem Gambling*'s approach is more transparent than *Lab Tests*': the Court of Appeal was able to hide behind the fact that the decision is a government tendering decision without giving specific reasons why this means that public law norms should not apply to the situation.

Both public law and private law have useful tools for dealing with particular situations. *Problem Gambling's* approach better balances the value of both, with "Woodhouse J assert[ing] a large role for public law values"[203] alongside private law ones. By recognising the value of each, judges are able to impose the particular values or actions that are most suitable for the case before them. The structured contextual approach recognises that government tendering decisions are made by the government and can have a large public impact. Therefore, the government needs to be held accountable for how the decisions are made and courts have a role in enforcing the use of good administrative practices. But *Problem Gambling* also recognises that these are contracting decisions between two parties where commercial concerns such as certainty and the ability to freely negotiate are important. The structured contextual approach has the flexibility to not interfere with these requirements when they outweigh the public law concerns.[204] In contrast, *Lab Tests* supplanted public law concerns with private law concerns.[205] Under this approach, private law requirements always outweigh public law norms, apart from cases of fraud, corruption or bad faith. The *Lab Tests* approach is so concerned with the need to protect governments when acting commercially, that it is blind to the need to protect the public and other commercial parties from improper decision-making.

Attempts to slot government tendering decisions into the binary public-private classification are thus unhelpful, and illustrate why the approach has fallen out of favour. Such a classification ignores the unique features of individual decisions. This can be seen in the inability of the *Lab Tests* approach to categorise government tendering decisions as fully private. It is forced to recognise the presence of public law concerns and create exceptions to the rule. *Problem Gambling*'s approach is a more honest and useful way of dealing with

[202] Cassie and Knight, above n 95, at 89.
[203] McLean, above n 183, at 14.
[204] Bailey, above n 179, at 463.
[205] McLean, above n 183, at 12.

government tendering decisions because it recognises that they need to be answerable to both public and private law. The structured contextual approach allows for the use of public and private law norms to be tailored to individual situations. This enables government tendering decisions to further both private and public law aims.

D Conclusion

Lab Tests and *Problem Gambling* propose alternative approaches to determining whether government tendering decisions are justiciable. Normative aims and the public-private divide are two sets of criteria that indicate whether particular decisions are justiciable. Applying both to *Lab Tests* and *Problem Gambling* highlights the differences between the decisions and helps indicate which is more desirable. Elliot's normative aims demonstrate that *Problem Gambling*'s approach is better at utilising judicial review to control government action, and therefore to protect the public interest in ensuring good administration, by monitoring government tendering decisions. Consideration of whether government tendering decisions were public or private reveals that they have elements of each, but one may be more prevalent in a particular decision. This highlights the utility of *Problem Gambling*'s structured contextual approach which can respond to the individual situation when determining the justiciability of a decision. *Lab Tests* somewhat arbitrarily considers all government tendering decisions, bar those involving a few select grounds, as being private decisions and therefore non-justiciable. This is undesirable because it overlooks the need for public law standards to apply to government tendering decisions in order to keep the government accountable. Overall, *Problem Gambling* is more effective than *Lab Tests* at reflecting judicial review's aims.

As well as taking different approaches to dealing with justiciability, *Lab Tests* and *Problem Gambling* diverge in the actual mechanisms of how they determine this issue. In the next chapter I will look at the competing values of certainty and flexibility, and at how they are utilised by the two approaches. I will also consider to what extent these values are useful when determining the justiciability of government tendering decisions in a way that produces just outcomes.

IV What About Certainty?

Problem Gambling's structured contextual approach provides flexibility when assessing the justiciability of government tendering decisions. However, the price for this flexibility is certainty about which future tendering decisions will be justiciable.[206] The Court of Appeal in *Lab Tests* viewed certainty as extremely important in the area of government contracting decisions because of the commercial elements involved.[207] If the structured contextual approach is to be an acceptable alternative, it must adequately address this issue. The first two criteria, judicial review's normative aims and the characterisation of decisions as public or private, were focused on whether government tendering decisions should be considered justiciable. The third criterion focuses more on the ability of the approaches to effectively arrive at a decision on justiciability. Certainty and flexibility are two routes to achieve just results. Both values will be discussed in relation to their ability to accomplish Elliot's aims as a gauge of the utility and legitimacy of the *Lab Tests* and *Problem Gambling* approaches. This analysis shows that flexibility is the more important in this context and is thus the best criterion to measure the approaches by.

A Certainty and Clear Rules

1 Certainty in the judicial review context

Certainty is an important aspect of the rule of law as it gives society confidence to engage in various actions.[208] It requires rules that are "clear in meaning so that they are capable of being obeyed", allowing "people to live their lives conscious of the legal consequences that may flow from their actions".[209] Thus legal certainty requires rules to be clear and predictable, rather than vague and indefinite. If citizens cannot understand what rules require of them, it will be much harder for them to ensure their actions are lawful.[210] In judicial review, and particularly when reviewing government tendering decisions, the government also needs certainty. If the government does not know what obligations it has, it cannot ensure that it makes a lawful and fair decision. Therefore certainty supports the needs for 'bright-line' rules, rather than fuzzy ones.[211] Precise rules aid in the prediction and prescription of fair and correct practices.[212] Clarity about what rule applies gives the law certainty. As "[p]redictable and certain decisions are the proof that like cases are being treated alike," precision and clarity can thus help lead to just results.[213]

Certainty also requires the "faithful application of previously declared rules"[214] in all cases and "the existence of a relatively stable reciprocity of expectations between lawgiver and

[206] Boughey and Weeks, above n 162, at 334.
[207] *Lab Tests*, above n 2, at [60] and [88].
[208] Dean Knight "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" [2016] NZLR 63 at 90.
[209] Knight, above n 208, at 90.
[210] Lon Fuller *The Morality of Law* (Yale University Press, New Haven and London, 1969) at 63.
[211] Christopher Forsyth "'Blasphemy Against Basics': Doctrine, Conceptual Reasoning and Certain Decisions of the UK Supreme Court" in John Bell and others (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, Oxford, 2016) 145 at 148.
[212] Woolf, above n 112, at 1-029.
[213] Forsyth, above n 205, at 147.
[214] Knight, above n 208, at 90.

subject".[215] Therefore, in judicial review, judges need to be consistent in determining whether particular types of decisions are justiciable or not. The focus here is not just on the outcome but on the court's reasoning: reason-giving is important for furthering certainty.[216] Courts are required to "explain and justify their decisions" and "demonstrate that the rules they apply are 'grounded in principle'".[217] Transparency in the judicial reasoning process demonstrates how and why judges make decisions. This knowledge helps gives parties certainty about how judicial review will impact their actions.

However, an issue with pursuing certainty and establishing rules with clear boundaries is that someone is always left on the wrong side of the boundary.[218] Though the rule is designed to extend justice, in some situations it actually leads to injustice.[219] Justice Thomas recognised this, stating that "[t]he rigidity of an absolute rule solicits injustice; it is an invitation to deny to the individual the Justinian precept that 'justice is the set and constant purpose to give every man his due'."[220] Although certainty is a useful tool to achieve justice, it does not do so in every circumstance.

2 Furthering normative aims

While not a normative goal in itself, certainty is a criterion that can help achieve normative aims. Certainty is particularly important for achieving the first of Elliot's aims: that judicial review should ensure compliance with the rule of law. The rule of law relies on certainty because it "requires rules fixed and announced in advance"[221] which are "as clear and predictable as practicable."[222] This aim is supported by the promulgation of clear rules that determine the perimeter of government power.[223] Forsyth argues that any arbitrariness in particular situations caused "by clear rules must be tolerated in order to avoid general administrative arbitrariness when administrators have no clear limits to their power".[224] This means that the rule of law is better protected by having a clear rule that fully controls government power in most circumstances. This is the case even if there are a minority of situations where the clear rule means that government decisions left outside the rule are not kept accountable to public law norms. Yet public law norms form part of the rule of law applied to governments.[225] Striving to achieve certainty through a bright-line rule results in some situations where judicial review is unable to ensure government compliance with these norms.

Certainty can also contribute to Elliot's second and third normative aims. Clarity of rules, and certainty about when they will apply, guides government bodies in how to act appropriately. This secures the public's interest in good governance. A bright-line test makes justiciability a straight-forward issue, removing the need for complicated argument by parties. It would help

[215] Fuller, above n 210, at 209.
[216] Knight, above n 208, at 88.
[217] Lon Fuller *Anatomy of the Law* (Fredrick A Preager, London, 1968) at 91.
[218] Forsyth, above n 211, at 147.
[219] Forsyth, above n 211, at 147.
[220] *Chamberlains v Lai* [2006] NZSC 70 at [211].
[221] Forsyth, above n 211, at 148.
[222] *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295 at [33].
[223] Forsyth, above n 211, at 148.
[224] Forsyth, above n 211, at 148.
[225] Elliot, above n 111, at 80; Woolf, above n 112, at 1-022 and 1-023.

keep judicial review "a relatively simple, untechnical and prompt procedure",[226] an aim widely accepted by New Zealand courts.[227] Contrary to this goal, judicial review has become very complicated.[228] A bright-line rule for justiciability may help reduce this complexity, making the entrance question for judicial review more predictable. A simple procedure would help judicial review be an effective mechanism of control on government action. Parties would know whether a particular decision would be justiciable, giving them more confidence to utilise judicial review as a control.

3 The desirability of certainty for government tendering decisions

Certainty is of great importance in the realm of government tendering decisions because parties are agreeing to enter into binding commercial agreements. Contracts are intended to be certain so that parties involved are sufficiently confident in the agreed outcome to engage in the costs associated with meeting their obligations. Commercial parties should be able to rely on the finality of a contract with a government department.[229] Because of this, Boughey and Weeks suggest that "government contracting decisions are incongruous with judicial review".[230] Allowing judicial review of these decisions "would place government at an enormous disadvantage, since there would be inherent uncertainty in every contractual relationship to which it may become party". [231] This may cause some parties "to avoid the risk of government contracting altogether."[232] The government heavily relies on contracting to fulfil its public obligations, so the public interest is served by allowing them to engage in these contracts effectively.[233] The public may even have an interest in allowing governments to act competitively and obtain good value for money.[234] Allowing judicial review of these decisions would cause unnecessary delay and uncertainty, which is not in the public's interest.[235] This was the approach taken by the Privy Council in *Pratt Contractors.* It noted that in commercial dealings, parties are entitled to act in their own commercial interests.[236] This suggested to the Privy Council that public law norms such as bias or rights to natural justice should not 'hobble' public authorities when choosing who to contract with.[237]

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[226] Cooke P in *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353.
[227] Affirmed in *Lab Tests*, above n 2, at [342]; *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA) at [19] and *Wilson v White* [2005] 1 NZLR 189 (CA) at [25].
[228] *Lab Tests*, above n 2, at [343], [405]; *Croawell v Police* HC Timaru CRI-2006-476-15, 9 February 2007 at [3].
[229] See Heath J's point in *Foodstuffs (Auckland) Ltd v Progressive Enterprises Ltd* HC Auckland M680-SW02, 14 June 2002 at [64](c) in regards to consents being awarded.
[230] At 319.
[231] Boughey and Weeks, above n 162, at 319-320.
[232] Boughey and Weeks, above n 162, at 320.
[233] *Lab Tests*, above n 2, at [88].
[234] This was argued in *Irving Shipbuilding Inc v Canada (Attorney General)* 2009 FCA 116, (2009) 314 DLR (4th) 340 at [51] in order to justify the imposition of procedural fairness obligations on the public body putting out the tender. However the court did not consider the interest sufficient to justify imposing those obligations.
[235] Evans JA in *Irving Shipbuilding*, above n 233, at [52], [54].
[236] At [41].
[237] At [3]. It must be remembered that *Pratt Contractors* was a claim in contract and focused on whether public law norms should be brought into private law claim for breach of contract, rather than a decision on whether the decision could be reviewed.

4 Comparing the certainty given by Problem Gambling *and* Lab Tests

(a) *Lab Tests*

The *Lab Tests* approach gives effect to Forsyth's suggestion that a clear rule protecting the majority of situations is the best way to ensure the rule of law. The rule clearly demarcates the boundaries of judicial review, so judges and the government know where public law norms will be applied. It would suggest that although there may be situations where judicial supervision is needed outside this boundary, leaving them unmonitored is a necessary sacrifice to achieve general clarity in the law. The rule in *Lab Tests* makes it clear that government tendering decisions are not generally justiciable. Therefore while it may be certain, this certainty does not help judicial review to be an effective control over government actions in this area.

Lab Tests is not without its uncertainty. There is a danger that although appearing to be clear, its rules about justiciability "camouflage judicial discretion because of… [the] ease by which they are manipulated".[238] This manipulation without clear justification is demonstrated by the Court's expansion of *Mercury Energy*'s three accepted grounds of review for SOEs to cover analogous situations, such as inside information being used to disadvantage rivals.[239] As noted in the previous chapter, there is a risk that the court could continue to expand these grounds in this way, leading to significant uncertainty in the area. The risk is heightened because *Lab Tests* does not provide clear reasons supporting the expansion. Parties have no guidance as to when another court may follow the same path and review a decision against their expectations.

(b) *Problem Gambling*

Problem Gambling's structured contextual approach provides less certainty than a bright-line rule. Rather than having a clear categorisation of government tendering decisions as non-justiciable, each decision is individually considered. Knight suggests that despite "employing a seemingly simple litmus test", a contextual approach is not well suited to achieving clarity in the law because of "the vagueness of the instinctual standards" it uses.[240] The approach "repudiates any need for rules or law, in favour of judicial instinct".[241] This leads to uncertainty because it is difficult to predict how a judge will decide the way in which various factors will impact on the decision's justiciability. However, Knight's analysis is not directly applicable to *Problem Gambling*'s approach. Knight was conceiving of a true contextual approach with no guidelines. Justice Woodhouse's structured approach is more rule-based: it lays out factors that assist in determining justiciability. Although judicial discretion is required, the decision is guided by specific considerations. Nonetheless, there is still a danger under the structured contextual approach that judges can decide an outcome they think is fair, and then use the factors to arrive at that outcome. This would negate the certainty provided by the specific factors because they risk being manipulated rather than honestly applied.

[238] Knight, above n 208, at 87-88.
[239] *Lab Tests*, above n 2, at [91].
[240] Knight, above n 208, at 90.
[241] Knight, above n 208, at 87.

Justice Woodhouse's approach insulates against this risk by requiring judges to explain how these factors affect the result. Certainty is aided when courts clearly articulate the principles or rules that govern their supervisory jurisdiction and provide a "reasoned elaboration of the basis on which those principles or rules are applied in particular cases".[242] This limits the freedom of judges to manipulate the factors because each has to be adequately explained in the context. Determinations of justiciability under the *Problem Gambling* approach provide more clarity in their reasoning than those under the *Lab Tests* approach. *Problem Gambling* is therefore more effective at achieving this aspect of certainty. Over time, decisions applying *Problem Gambling*'s approach could build a baseline as to when the court will decide a decision is justiciable or not. Overall, this would bring more certainty to the area.

(c) Conclusion

Both approaches recognise the need for certainty as a way to achieve justice and provide some level of it. *Lab Tests*' certainty comes from its use of a bright-line rule, while *Problem Gambling*'s comes from providing reasons for its decisions. At the same time, neither approach is completely certain because of the way they are able to be manipulated. In *Lab Tests* this risk of manipulation lies in the expansion of the exceptions to non-justiciability without justification. In *Problem Gambling*, it lies in judges reverse-engineering the factors to arrive at the outcome they want. Certainty is not the only way to achieve justice. Placing too much weight on it can even lead to injustices. An investigation of the role that flexibility has to play will therefore be crucial in deciding between the two approaches.

B Flexibility and Individuated Justice

1 Flexibility and justice in the judicial review context

Justice requires cases which are alike in all relevant characteristics to be treated alike.[243] A just result is the one that would be expected to be made when judicial review is being carried out effectively with all relevant considerations examined.[244] A just decision is one made according to the correct principles, so predictable decisions based on these principles are a sign that justice is being done.[245] Certainty is one way to achieve justice because it ensures that similar decisions are all made according to the same clear law. Yet, it can also result in injustice.[246] Sometimes a just result may instead require individualised decision-making, which takes into account all the circumstances of the individual case so that the correct outcome may be reached.[247] While judicial review "will naturally search for precision… it cannot afford entirely to abandon flexibility'.[248]

Flexibility aims to achieve individuated justice by recognising the particular circumstances of a specific case and what would be considered fair for all involved.[249] While it uses a different

[242] Knight, above n 208, at 88.
[243] Forsyth, above n 205, at 147.
[244] Forsyth, above n 205, at 145.
[245] Forsyth, above n 205, at 147.
[246] See point at n 212.
[247] Matthew Smith *The New Zealand judicial review handbook* (Brookers, Wellington, 2011) at 291.
[248] Woolf, above n 112, at 1-029.
[249] Woolf, above n 112, at 1-029.

route to achieve justice than certainty, it is not inferior to it.[250] Context is a key factor in ensuring just results. The ability to consider contextual factors gives courts the flexibility to ensure that the outcome is the most appropriate one for the situation. In comparison, a bright-line rule results in courts being constrained to reach a particular outcome because of the presence (or lack of) a particular factor. As Lord Steyn noted, "In law context is everything".[251] In judicial review this is particularly important because a wide range of situations come before the court, each calling for different public law norms to be applied. Flexibility is one of judicial review's most desirable features.[252]

However, this contextual flexibility can also lead to injustice. While it secures a just outcome for the parties before the court, "it promises injustice to others who, since the outcome of their case cannot be predicted, are bound to be drawn into damaging litigation as a result".[253] If there is uncertainty about a decision's justiciability, public bodies may ignore public law concerns when making it, banking on the cost of litigating an unclear issue to dissuade aggrieved parties from judicial review. Like certainty, flexibility is a useful tool, but it does not always lead to just results.

2 Furthering normative aims

A flexible approach helps ensure that government tendering decisions comply with the rule of law. The rule of law requires government bodies to stay within the bounds of their authority. Judicial review operates as a regime of legal control on government decisions in order to enforce this. Flexibility is useful in helping judicial review enforce the rule of law because it gives judges "the broad power to intervene to address injustice wherever it [i]s seen".[254] It gives courts the ability to supervise all actions of government, even the more unusual, while a bright-line rule only reaches more traditional governmental powers and actions.

Knight proposes that as well as "policing administrative legality", judicial review plays an "important collateral role in articulating and elaborating the principles of good administration" that the government should honour.[255] This aim is similar to the third purpose proposed by Elliot.[256] Flexibility helps achieve this because it allows for a wider application of these principles and a tailoring of them to particular circumstances. This supports their value and incentivises better administrative standards for governments in government tendering decisions and other similar areas. A flexible judicial review regime is able to be more coherent overall as it takes a holistic approach to the enforcement of these norms, rather than sharply cutting off their application once a certain line is reached.[257] Flexibility is therefore crucial to the creation of an approach to justiciability that is able to adequately achieve these aims.

[250] At 1-029.
[251] Lord Steyn in *R v Secretary of State for the Home Department, ex p Daly* [2001] 3 All ER 433 at 447.
[252] Wicks, above n 135, at 54.
[253] Forsyth, above n 254, at 149.
[254] Knight, above n 208, at 83.
[255] At 93.
[256] See point at n 122.
[257] Knight, above n 208, at 91.

3 Can judicial review ever be certain?

Judicial review is a highly discretionary action where judges have a lot of flexibility to decide how they should respond to an action.[258] Because of this, some suggest that judges may in fact be deciding the outcome and then working out the reasoning for it, rather than reasoning to an outcome.[259] Judicial discretion is most evident at the remedies stage. Unlike many private law actions where remedies such as damages are of right, even if a judicial review action is successful, there is no guarantee of a remedy.[260] Judges balance "the interest in [the] vindication of individual legal rights and the overall interests of administration".[261] This discretion requires a consideration of a variety of individualised contextual factors.[262] The use of context can also be seen at the substantive stage where courts are able to adjust the requirements of the government under different grounds of review, depending on the situation.[263]

De Smith acknowledges that many of the standards applied in judicial review are open-textured, so recognition of particular circumstances must accompany the search for precise standards that guide courts.[264] This suggests that judicial review can never be completely certain. At its core, judicial review is focused on judicial discretion and the ability to tailor the law to meet the needs of a particular situation. Discounting any approach because it recognises and utilises this flexibility overlooks the inherent uncertainty of judicial review. This feature of judicial review is why those supporting the *Lab Tests* approach argue that it is not appropriate in commercial circumstances.[265] I suggest that the desire for certainty in a commercial context does not exclude the need for judicial review and a more flexible approach to justiciability.

4 Is flexibility or certainty more desirable in this context?

In *Telco Technology,* Collins J recognised that his decision to issue an interim injunction preventing the Ministry of Education from awarding the tendered contract to another bidder would "cause some delay, uncertainty and inconvenience".[266] However, he determined that these consequences could be mitigated and that the injunction needed to be granted in the interests of justice.[267] Justice Collins utilised his discretion to determine that because of the contextual factors present, judicial review was appropriate.[268] The question is whether he (and later, Woodhouse J) was right to prioritise flexibility over certainty in this context in order to achieve a just result.

[258] Joseph, above n 80, at 22.4.1.
[259] *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569 at [13].
[260] Although *Air Nelson v Minister of Transport* [2008] NZCA 236 established that there is a presumption that a remedy will be given when judicial review is successfully made out, judges still retain a discretion not to award a remedy based on a variety of factors. There is no such discretion under private law actions.
[261] Wicks, above n 135, at 54.
[262] Woolf, above n 112, at 1-029.
[263] *Durayappah v Fernando* [1967] 2 AC 337 at 349.
[264] At 1-029.
[265] For example, see William Young J in *Ririnui,* above n 87, at [214].
[266] At [5].
[267] At [53]-[56].
[268] At [34]-[40].

Neither certainty nor flexibility is an absolute duty.[269] So there is scope to determine which is more appropriate in various areas of law. Certainty should not be treated as equivalent to justice.[270] Matthew Smith makes the point that the legal system is referred to as the 'justice system' rather than the 'certainty system'.[271] Although superficial, this points to the deeper truth that certainty is only a means, while justice is the end. The desirability and utility of certainty in some situations does not preclude other tools, such as flexibility, from being more helpful in others.

Certainty is valued in this context because it protects the commercial nature of government contracting decisions. Yet, allowing the courts some flexibility to review these decisions does not necessarily remove all commercial certainty. Bailey argues that "[p]ublic law principles are sufficiently flexible to… ensure that a public body is not hamstrung in its commercial dealings except to the extent that a genuine public interest is at stake."[272] Public law values can also benefit the tendering process.[273] Contract law requires honesty,[274] and commercial interests are best served by ensuring the integrity of the procurement system.[275] These private law values would be furthered by the public law norms that judicial review enforces. Tendering decisions may sometimes have to be undone, which would not be in that tenderer's interest. However, the private law also results in contracts being voided in some situations, such as where a contract is found to substantially lessen competition in a market.[276] This uncertainty is necessary to ensure that justice is being achieved by holding the government to proper standards of good administration as it makes tendering decisions.

Judicial review utilises judicial discretion so that it is able to adjust to the situation before it. This flexibility is helpful in the context of government tendering decisions as they involve a wide variety of potential competing factors. These decisions see both public and private norms competing for recognition, so a flexible approach allows the courts to recognise and give appropriate weight to both, dependant on the particular context. A certain bright-line rule will always prioritise one set of norms. For *Lab Tests*, private law norms will always be prioritised over public ones.[277] If the courts are unable to apply relevant public law principles to government tendering decisions, such as the government treating all parties fairly, injustices will result. There would be situations where the government is able to abuse its power when contracting, without those affected having recourse to judicial review. A flexible approach can recognise when the government is abusing its power in this manner and is able to apply the appropriate norms. This helps to create more just results because decisions are made according to the correct principles for that situation.

[269] Knight, above n 208, at 87.
[270] Smith, above n 247, at 379.
[271] At 379.
[272] Bailey, above n 179, at 451.
[273] See McLean, above 177 at 9.
[274] Nick Seddon "The Interaction of Contract and Executive Power" (2003) 31 FLR 541 at 548.
[275] Mullan, above n 147, at 202.
[276] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed. LexisNexis NZ Limited, Wellington, 2016) at 13.3.4(b).
[277] McLean, above n 183, at 12.

C A Balancing Act

Sometimes justice is met by having certain and clear rules; other times by giving courts flexible scope to consider context. Therefore, in any system there will be trade-offs "between flexibility and responsiveness on the one hand, and consistency and predictability on the other".[278] Balancing the usefulness of both, while trying to avoid their pitfalls, is a very difficult task. I believe that *Problem Gambling* does a far better job of this than *Lab Tests*.

When determining the justiciability of government tendering decisions, the Court of Appeal in *Lab Tests* was committed to the need for certainty in order to protect the commercial dealings involved.[279] Governments and tendering parties can be certain that the decision will almost never be reviewed, giving them the necessary confidence to engage in the commercial activity needed to support the contract. However, *Lab Tests* leaves open the ability of future courts to expand the grounds upon which government tendering decisions may be reviewed. This could result in uncertainty in the area.

Lab Tests' strict rule for justiciability also means that many decisions will fall outside judicial review's jurisdiction. These decisions could have serious flaws that will have a large impact on the public. Yet *Lab Tests*' approach is unable to take this into account, leaving any flaws to be dealt with in the private law. Private law remedies are an insufficient replacement for public law remedies because they have a very different focus. Under contract law, a third party cannot challenge the validity of a contract, so unsuccessful bidders cannot have the successful tendering contract voided. If bidders can successfully argue that there was a breach by the government of a preliminary contract (the tendering process agreement) the remedy will be damages rather than having the possibility of being successfully awarded the tender. Only public law remedies are focused on holding the government to public law norms.

The *Problem Gambling* approach has the flexibility to take public law norms into account. The presence (or absence) of various contextual factors can be taken into account by judges when determining justiciability in order to achieve the result most in keeping with these norms. The certainty of a bright-line test is sacrificed for the flexibility to achieve a just outcome for the particular situation. However, this structured contextual approach does not ignore the need for certainty. It lays out a range of factors that are to be considered when deciding justiciability. These give judges flexibility to pick up on important factors that a bright-line test would ignore, without giving them the power to simply decide instinctually. Clear reasons must be given for the decision, which brings certainty to the law. *Problem Gambling*'s approach balances certainty with flexibility, allowing just results in the area of government tendering. I suggest that *Problem Gambling*'s structured contextual approach should be the one favoured by courts in this area.

[278] Knight, above n 208, at 87.
[279] See [60] and [88].

V Conclusion

Problem Gambling provided Woodhouse J with the opportunity to clarify and follow the Court of Appeal's approach to the justiciability of government tendering decisions in *Lab Tests.* However, in attempting to achieve what he considered to be the just outcome for the case before him, Woodhouse J took a completely new approach. I have labelled this the structured contextual approach. Contextual factors are utilised to determine justiciability, but structure is provided by the list of factors to be considered, and the need to provide reasons for how each factor pointed towards the outcome. While Woodhouse J drew on statements from the Court of Appeal's judgments in creating this approach, it is fundamentally different to that Court's approach. *Lab Tests* held that government tendering decisions are only justiciable when one of a small number of grounds is pleaded. Generally, these decisions are non-justiciable because their commercial subject matter makes them private. However, *Lab Tests*' hybrid approach of 'sometimes justiciable' is not conceptually sound. Justiciability focuses on the decision itself and whether its content is appropriate for consideration by the courts. *Lab Tests* incorrectly takes the grounds pleaded as the decisive factor. *Problem Gambling*'s use of contextual factors to determine justiciability is much sounder.

Using three sets of criteria, I have compared the ability of the two approaches to further the purposes of judicial review. Consideration of Elliot's normative aims for judicial review shows that both approaches recognise the need to ensure that the government conforms to the rule of law. *Problem Gambling* is better able to utilise judicial review as a special regime of legal control and hold the government to standards of good administration. It does this by allowing judicial review to supervise a wider range of government tendering decisions. *Lab Tests* was not willing to expand the role of judicial review in this area because it viewed these decisions as private, following the public-private divide's binary categories. The Court of Appeal placed weight on the commercial context and determined that the public interest was best served by allowing private law to govern this competitive process. However, this overlooks the fact that governments are not regular commercial players but have special powers and responsibilities. Governments need to be held accountable to public law norms, even in a commercial context. *Problem Gambling* recognises that there are situations when public law concerns should be prioritised. Its structured contextual approach considers all the relevant features of a particular decision and then decides whether this context points towards the need for judicial review or not. This gives the court the flexibility to weigh up both private and public concerns rather than automatically categorising the decision as private. Elliot's normative aims are a more meaningful guide to an approach's legitimacy than the public-private divide, as they provide a more complete vision of what judicial review should achieve. *Problem Gambling* is more effective at embodying this vision.

As well as diverging in their conception of justiciability, the third criterion shows that the two approaches utilise values differently when making decisions. *Lab Tests* focuses on the need for certainty in order to achieve justice. In a commercial situation, certainty is important to

encourage parties to contract with government. A bright-line rule is able to give parties clarity about whether a decision is justiciable or not. However the approach is not completely certain as the exceptions to the rule are able to be expanded without justification. *Problem Gambling* does not provide certainty through a bright-line rule but its structured contextual approach gives clarity on why an outcome was reached. This serves as a guide for future situations. *Problem Gambling* utilises flexibility to take into account all relevant characteristics to arrive at a principled and just result.

An analysis of these criteria demonstrates the superior utility of *Problem Gambling*'s structured contextual approach. Although Woodhouse J did not intend to reinvent how the justiciability of government tendering decisions are determined, the weight he placed on contextual factors has done so. The flexibility this approach provides allows both public and private law considerations to be taken into account. This is extremely useful in an area like government tendering decisions where contextual factors can diverge so greatly, and both private and public law norms may be relevant. *Problem Gambling*'s approach allows judicial review to play its role of supervising government action and protecting the public interest, while respecting the need for contractual certainty. Justice Woodhouse's novel approach to the justiciability of government tendering decisions was a gamble that paid off.

Bibliography

A Cases

I New Zealand

Air Nelson v Minister of Transport [2008] NZCA 236

Association of Dispensing Opticians of New Zealand Inc v Opticians Board [2000] 1 NZLR 158 (CA).

Bayline Group Limited v The Secretary of Education [2007] NZAR 747.

Chief Executive of the Department of Labour v Yadegary [2008] NZCA 295.

Croawell v Police HC Timaru CRI-2006-476-15, 9 February 2007.

Curtis v Minister of Defence [2002] 2 NZLR 744 (CA).

Foodstuffs (Auckland) Ltd v Progressive Enterprises Ltd HC Auckland M680-SW02, 14 June 2002.

Genesis Power ltd v Greenpeace New Zealand Inc [2007] NZCA 569.

Hamilton City Council v Waikato Electricity Authority [1994] 1 NZLR 741.

Lab Tests Auckland v Auckland District Health Board [2008] NZCA 385, [2009] NZLR 776.

McGuire v Hastings District Council [2000] UKPC 43, [2002] 2 NZLR 577.

Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd [1994] 2 NZLR 385 (PC).

Minister of Energy v Petrocorp Exploration Ltd [1989] 1 NZLR 348 (CA).

Pratt Contractors Ltd v Transit New Zealand [2003] UKPC 83, [2005] 2 NZLR 433 (PC).

Problem Gambling Foundation of New Zealand v Attorney-General [2015] NZHC 1701.

Ririnui v Landcorp Farming Ltd [2016] NZSC 62.

Telco Technology Services Ltd v Ministry of Education [2014] NZHC 213.

Webster v Auckland Harbour Board [1987] 2 NZLR 129 (CA).

Wilson v White [2005] 1 NZLR 189 (CA).

II United Kingdom

Shergill v Kaira [2014] UKSC 33, [2015] AC 359.

R (on the application of Molinaro) v Kensington RLBC [2001] EWHC Admin 896, [2002] LGR 336.

III Canada

Air Canada v Toronto Port Authority 2011 FCA 347.

Irving Shipbuilding Inc v Canada (Attorney General) 2009 FCA 116, (2009) 314 DLR (4th) 340.

B Legislation

Gambling Act 2003.

Judicature Act 1908.

Judicature Amendment Act 1972.

New Zealand Public Health and Disability Act 2000.

C Cabinet Documents

"Mandatory Rules of Procurement for Departments", Cabinet, April 2006.

D Books and Chapters in Books

Sue Arrowsmith *Government Procurement and Judicial Review* (Carswell, Toronto, 1988).

Sue Arrowsmith *The Law of Public Utilities Procurement* (Sweet & Maxwell, London, 2005).

John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed. LexisNexis NZ Limited, Wellington, 2016).

Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011).

Chris Finn "The concept of 'justiciability' in administrative law" in Matthew Groves and HP Lee *Australian Administrative Law: Fundamentals, principles and doctrines* (Cambridge University Press, Cambridge, 2007) 143.

Christopher Forsyth "'Blasphemy Against Basics': Doctrine, Conceptual Reasoning and Certain Decisions of the UK Supreme Court" in John Bell and others (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, Oxford, 2016) 145.

Lon Fuller *Anatomy of the Law* (Fredrick A Preager, London, 1968).

Lon Fuller *The Morality of Law* (Yale University Press, New Haven and London, 1969).

Philip A Joseph *Constitutional and administrative law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014).

Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins (eds) *The Executive and Public Law* (Oxford University Press, Oxford, 2006) 124.

Janet McLean “Public Function Tests: Bringing Back the State?” in David Dyzenhaus, Murray Hunat and Grant Huscroft (eds) *A Simple Common Lawyer- Essays in Honour of Michael Taggart* (Hart Publishing, Portland (Oregon) 2009) 185.

Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999).

Matthew Smith *The New Zealand judicial review handbook* (Brookers, Wellington, 2011).

GDS Taylor *Judicial Review: a New Zealand perspective* (3rd edition, LexisNexis NZ Limited, Wellington, 2014).

Harry Woolf and others *De Smith’s Judicial Review* (7th ed, Sweet & Maxwell, London, 2013).

E Journal Articles

Sue Arrowsmith “Government contracts and public law” (1990) 10 Legal Studies 231.

Sue Arrowsmith “Judicial Review and the Contractual Powers of Public Authorities” (1990) 106 LQR 277.

SH Bailey "Judicial Review of Contracting Decisions" [2007] PL 444.

Janina Boughey and Greg Weeks “‘Officers of the Commonwealth’ in the Private Sector: Can the High Court Review Outsourced Exercises of Power?” (2013) 36(1) UNSWLJ 316.

Mark Elliot “Judicial Review’s Scope, Foundations and Purposes: Joining the Dots” [2012] NZLR 75.

Janna Hansen “Limits of Competition: Accountability in Government Contracting” (2003) 112 YLJ 2465.

Philip Joseph “False Dichotomies in Administrative Law: From There to Here” [2016] NZLR 127.

Dean Knight “A Murky Methodology: Standards of Review in Administrative Law” (2008) 6 NZJPIL 117.

Dean Knight “Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context” [2016] NZLR 63.

Sharron Mahon “Judicial Review of Crown Procurement Decisions: Available or Not?” [2011] J. Can. C. Construction Law. 287.

Janet McLean “Convergence in Public Law and Private Law Doctrines- the Case of Public Contracts” [2016] NZLR 5.

David Mullan “The State of Judicial Scrutiny of Public Contracting in New Zealand and Canada” (2012) 43 VUWLR 173.

James Neill “Procurement Challenges and the Scope of Judicial Review” [2012] JR 61.

James Palmer and Kate Wevers “Judicial review in a commercial context” [2009] NZLJ 14.

Nick Seddon “The Interaction of Contract and Executive Power” (2003) 31 FLR 541.

Daniel Stewart "Statutory Authority to Contract and the Role of Judicial Review” (2014) 33(1) UQLJ 43.

Michael Taggart “Corporatisation, contracting and the courts” [1994] PL 351.

Rayner Thwaites “The Changing Landscape of Non-Justiciability” [2016] NZLR 31.

Anthea Williams “The justiciability of government contracting decisions” [2015] NZLJ 253.

Nusrat Zar “Public Procurement and Alternative Remedies to Judicial Review” (2006) 11 JR 26.

F Other

Jeannie Cassie and Dean Knight “The Scope of Judicial Review: Who and What may be Reviewed” in *Administrative Law Intensive* (New Zealand Law Society seminar booklet, 2008) at 63.

McGechan on Procedure (online looseleaf ed, Thomson Reuters).

Sim’s Court Practice (online looseleaf ed, LexisNexis).

Anthony Wicks “A Private Law Issue in “Public Law Drag?”: Government Contract Award Processes and Judicial Review in New Zealand” (2009) OYLR.