
**A Private Law Issue in “Public Law Drag?”:
Government Contract Award Processes and Judicial Review in New
Zealand.**

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INTRODUCTION

As a general rule the Courts in New Zealand have seen the award of government contracts for public services as a private matter.¹ In this paper I would like to challenge that perception. Such a challenge is timely. In the recent, controversial *Lab Tests* litigation a High Court judge and the Court of Appeal took widely differing views on the proper scope of judicial review of a tender process for the award of a contract to provide laboratory testing services for the Auckland region.² Where the High Court saw review as justified by the importance of the subject matter of the contract and the need to maintain high standards in government, the Court of Appeal focussed on ensuring that commercial processes designed to maximise the public interest were not interfered with.³ Although the Supreme Court declined leave to appeal as the case was decided on its facts, the Supreme Court did acknowledge the different approaches taken in the courts below and indicated that had the facts been different the *Lab Tests* litigation may well have been a case for leave.

Taking its lead from the recent controversy and the acknowledgment of different approaches to review by the Supreme Court, chapter one sets out the current New Zealand approach to the reviewability of government contracts. The New Zealand approach is compared to the more unsettled English jurisprudence and alternative approaches are identified.

Chapter two argues that the current New Zealand approach to reviewability is deficient. It refutes the arguments it is based on and suggests an alternative, wider approach to reviewability that would better serve the public interest.

A consequence of the narrow approach to reviewability in New Zealand is that the consequences at the remedies stage of a wider approach to reviewability have rarely been considered. Chapter three examines these consequences and considers whether either the common law or statutory provisions governing the effect of a

¹ See A2(b) below.

² *Diagnostic Medlab v Auckland District Health Board* [2007] 2 NZLR 832 (HC); *Lab Tests Auckland v Auckland District Health Board* [2009] 1 NZLR 776 (CA)

³ See part A2(c) below.

finding of reviewable error on contracts should act as an impediment to a wider approach to judicial review of government contracting decisions.

CHAPTER I – THE CURRENT NEW ZEALAND APPROACH

A. New Zealand

1. Structure of Judicial Review

This paper is concerned with the proper scope of the reviewability stage of judicial review and therefore by implication with the proper scope of the grounds and remedies stages of review. Accordingly, before starting it is necessary to clarify the structure of judicial review. Reviewability is the first stage of a judicial review application. In it the Court answers the question: is this a decision which is amenable to review? The basic rule is that judicial review is available for “the exercise of any power having public consequences”.⁴ Accordingly, the reviewability inquiry is binary.

If a decision is reviewable the court then proceeds to the grounds stage. Here, the Court determines whether any of the grounds of review have been made out. If the challenge is based on procedural impropriety or the substantive grounds the Court also determines the intensity of review to be applied in the case.⁵ It may be that on

⁴ *Wilson v White* [2005] 1 NZLR 189, 196. See also *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 11. Underneath the basic rule lie issues of considerable complexity. Firstly, the reviewability inquiry may be broken down into further components: jurisdiction, justiciability and the “limits of public law”. The test also involves more complex elements at the justiciability stage such as consideration of the constitutional, democratic and institutional restraints on the courts to determine the appropriateness of review in a particular case. Secondly, the relationship between these components is a matter of some controversy as although analytically distinct, the Courts have not kept sharp distinctions between them. Thirdly, the recognition by the courts that at the grounds stage the Court may apply some grounds with varying levels of intensity has caused further complications as it has blurred the boundary between the reviewability stage and the grounds stage. However, as will be seen the general rule of whether a decision is “public” is an accurate reflection of the test the Courts have applied to determine the reviewability of government tendering processes. Therefore, although cases have refused review on the basis of jurisdiction, justiciability and reviewability it suffices to describe the courts’ approach as being about whether the decision is reviewable. See J Cassie and D Knight “The Scope of Judicial Review: Who and What May Be Reviewed” in New Zealand Law Society, *Administrative Law* (2008); D R Knight, “A Murky Methodology: Standards of Review in Administrative Law” (2008) 6 *NZJPIL* 117, 144-145.

⁵ It is “elementary” that the standard of procedural fairness to be applied in a particular case varies with the context: *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 141 per Cooke J; The Courts in New Zealand are increasingly recognising that a variable intensity of review is to be applied

examining the context of the decision the Court holds that there is no scope at all for review for procedural fairness or irrationality. If this is the case then the result is the same as if the decision was unreviewable. However, unlike the reviewability stage the inquiry the Court undertakes is not binary, varying standards of review may apply depending on a mix of contextual factors.

Finally, if a ground is made out the Court then has a discretion over whether to issue a remedy.

2. *The Orthodox New Zealand Approach*

(a) *Mercury Energy*

Courts in New Zealand have, as a general rule, been very reluctant to review government tender processes. The starting point for New Zealand courts is the decision of the Privy Council in *Mercury Energy v Electricity Corporation of New Zealand Ltd*.⁶ Here, Mercury, a local supplier of electricity sought judicial review of the decision of their bulk supplier, the Electricity Corporation, a State Owned Enterprise, to terminate a contract for the supply of electricity. The Court of Appeal held that the decisions of State Owned Enterprises were not reviewable.⁷ However, the Privy Council disagreed with the Court of Appeal and held that State Owned Enterprises were not immune from review. However, it too held that the particular decision to terminate the supply contract was not reviewable.⁸ The Privy Council noted:⁹

It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith...Industrial disputes

to the substantive grounds as well: *Wolf v Minister of Immigration* [2004] NZAR 414. In *Wolf* Wild J held that the intensity of review on substantive grounds would vary depending on depends on the nature of the decision: upon who made it; by what process; what the decision involves (i.e. its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them" *ibid*, para 47. See also *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601, 606.

⁶ [1994] 2 NZLR 385.

⁷ *Auckland Electric Power Board v Electricity Corporation of NZ* [1994] 1 NZLR 551.

⁸ Specifically, the Privy Council held that the decision was "in principle amenable to review" but that the decision was not justiciable: [1994] 2 NZLR 385, 388-391.

⁹ *Ibid*, 391.

over prices and other related matters can only be solved by industry or by government interference and not by judicial interference in the absence of a breach of law.

The Privy Council emphasised that accountability for the performance of commercial functions was to be achieved by the exercise of powers granted to Ministers under the State Owned Enterprises Act and the Ministers' accountability to Parliament and to the electorate rather than through judicial review.¹⁰

Mercury is important for four reasons. Firstly, as will be discussed shortly, the message from *Mercury* that contracting is a commercial function that should not be reviewed and is better left to alternative accountability mechanisms is the foundation for the courts' approach to review of government tender processes.¹¹

Secondly, *Mercury* clarified the scope of the procedure for obtaining review under the Judicature Amendment Act 1972.¹² Under the Act a review application may be brought for the exercise of any "statutory power of decision".¹³ Before *Mercury* the Court of Appeal had given two conflicting opinions over whether contractual powers exercised under a general empowering provision were statutory powers of decision or whether the definition was limited to statutory powers that expressly gave and delimited a body's power to contract.¹⁴ *Mercury* resolved this controversy in favour of the former approach as in *Mercury* the contract was made under a general empowering provision and the Privy Council held that review was available both at common law and under the Judicature Amendment Act.¹⁵

¹⁰ *Ibid.*

¹¹ Whether this should be the case is open to some question. Taggart has pointed out that the limitation of grounds in *Mercury* was obiter and inconsistent with the reasons the Privy Council gave for holding that SOEs were amenable to review: M Taggart, "Corporatisation, Contracting and the Courts" (1994) *PL* 351, 356-358. Taggart's view was recently endorsed by Baragwanath J in a dissenting opinion in the Court of Appeal in *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZCA 259, para 121. However, as will be seen the affirmation of the lower courts' use of *Mercury* in the government tender context by the Court of Appeal in *Lab Tests* means that if the approach is to be changed it will be a matter for the Supreme Court.

¹² Review may also be applied for at common law under Part 30 of the High Court Rules.

¹³ s3, s4. Section 4 provides that review is available for the exercise of any "statutory power". "Statutory power" is defined in section 3 to include a "statutory power of decision" as defined in the section.

¹⁴ *New Zealand Stock Exchange v Listed Companies Association* [1984] 1 NZLR 699 (CA); *Webster v Auckland Harbour Board* [1983] NZLR 646; *Webster v Auckland Harbour Board* [1987] 2 NZLR 129.

¹⁵ [1994] 2 NZLR 385, 388; Taggart, "Corporatisation, Contracting and the Courts" (1994), 355-356. Prior to *Mercury* decisions on government contracting that relied on the stock exchange approach

Thirdly, *Mercury* has modified the concept of reviewability. Normally, if a decision is reviewable, it is reviewable on all grounds.¹⁶ However, *Mercury* held that decisions would be reviewable on some, albeit very limited, grounds but not others.

Accordingly, where *Mercury* has been applied, “reviewable” has come to mean that the decision may be reviewed for decisions apart from bad faith, fraud and corruption may be reviewed.

Fourthly, *Mercury* took a functional approach to review,¹⁷ which as will be seen, has been applied in subsequent case law.¹⁸ As is evident from the quotation from *Wilson v White* cited earlier, this functional approach to review is now firmly entrenched as the test for reviewability in New Zealand.

(b) Response of the Lower Courts to *Mercury* – Developing the Orthodox Approach

Since *Mercury* the Courts have been very reluctant to review government tender processes. The courts have developed three main lines of argument to justify the refusal to review. In practice, these arguments are rarely kept separate, but they are presented separately here for ease of analysis.

(i) First Argument: Characterisation of government contracting as a “commercial” function

Firstly, government contracting has been characterised as a “commercial” function that in accordance with *Mercury* is unreviewable. Consistently with the functional approach in *Mercury*, in one of the first cases to deal with government contracting after the Privy Council decision, *Napier City Council v Health Care Hawkes Bay* Ellis J held that the approach to review in *Mercury* applied to bodies other than state

were dominated by attempts to determine whether the contracting power was a statutory power or merely a “statutory function”: G D S Taylor, *Judicial review: a New Zealand perspective* (1991), 35.

¹⁶ A C L Davies, *The Public Law of Government Contracts* (2008), 162.

¹⁷ A functional approach to reviewability may be contrasted with an institutional approach to reviewability where reviewability is determined by the source of a body’s power: Cane, *Administrative Law* (4th ed) (2004), 3-5.

¹⁸ See part A 2 (b) (i) below.

owned enterprises.¹⁹ To Apply *Mercury* Ellis J developed a spectrum to determine whether a function was “commercial”, holding:²⁰

It has always been understood that many commercial transactions cannot be reviewed, but the difficulty has arisen in some cases where the importance or the significance or [sic] the decision takes it out of the realm of the purely commercial and into realm of quasi governmental administrative decision which is reviewable.

Similarly, in *Southern Community Laboratories Ltd v Healthcare Otago Ltd* Eichelbaum CJ saw the approach of the courts as placing the decision on a continuum between decisions having a major impact on the community and minor supply contracts.²¹

Despite concerning core public services such as health care, so far in New Zealand government tendering processes have failed to reach the standard of “quasi-governmental decisions”.²² This is partly due to the way the continuum used by the courts was developed. In the *Napier City Council* case Ellis J upheld an application for review of a decision Crown Health Enterprise to establish an acute hospital in Hastings and reduce services provided in Napier.²³ Accordingly, Eichelbaum CJ’s conclusion in *Southern Community Laboratories* that the tendering process for the award of a contract for the provision of laboratory testing services could not “be placed in the same category, as the major problem faced by the corresponding body in the Napier City Council case”,²⁴ is hardly surprising. Any procurement process, involving as it does contracting and purchasing is likely to look commercial in comparison to a decision to close a hospital. Moreover, the courts have been unimpressed by arguments emphasising the public nature of the service that will be

¹⁹ 15/12/1994, Ellis J, HC Napier CP 29/04, 28.

²⁰ *Ibid*, 27-28.

²¹ 19/12/96, Eichelbaum CJ, HC Dunedin CP 30/96, 16. Gendall J recently adopted Eichelbaum CJ’s approach in *Schelde Marinebouw BV v A-G* [2005] NZAR 356 para 29.

²² In *Schelde Marinebouw*, *3 R’s Recycling v Wairoa District Council*, 30/04/02, Randerson J, HC Gisborne CP 2/02 and *Gregory v Rangitikei District Council* [1995] 2 NZLR 208 were cited as examples of successful reviews of government contracting decisions. However, they can be distinguished from cases that concern tenders for public service contracts. *3 R’s Recycling* was a challenge not to an award after a tender but to the decision to put a contract out to tender in the first place. *Gregory* concerned a council decision to sell land and bad faith was expressly alleged.

²³ 15/12/1994, Ellis J, HC Napier CP 29/04.

²⁴ *Southern Community Laboratories*, 16;

provided under the contract.²⁵ The Courts have tended instead to focus on the commercial nature of the process for obtaining the service.

Recently, the High Court took a slightly different approach to characterising a government tender process. In *Bayline Group Limited v The Secretary of Education* Simon France J held that the award of a tender for bus contracts was unreviewable.²⁶ Simon France J relied on English authority for the proposition that government contracts would not be reviewable unless there was a “public law element”.²⁷ His honour interpreted this in light of *Wilson v White*, where the Court of Appeal held that review would be available where decisions had “public consequences” to mean that review would only be available if the tendering process had “public consequences”. As the buses would be run in essentially the same way no matter which bidder was chosen Simon France J held that the award of the contract was a “quintessentially low level” contracting decision that was not amenable to judicial review.²⁸ Although phrased in different terms the approach in *Bayline* is really just the flip-side of the approach taken in previous cases. If a decision has no public consequences it can be said to be a commercial decision.

(ii) Second Argument: The Primacy of Private Law Remedies

The Courts have emphasised the primacy of private law remedies in order to justify a narrow scope for review. Summarising the jurisprudence since *Mercury*, Chisholm J noted “[t]he underlying principle seems to be that judicial review should not be imposed on commercial decisions where generally speaking private law remedies will be appropriate”.²⁹ This is consistent with the Privy Council’s description of judicial review in *Mercury* as a “judicial invention to secure that decisions are made by the executive or by a public body according to law even if the decision does not otherwise involve an actionable wrong”.³⁰

The underlying concerns of this argument are relatively clear. Firstly, it reflects the Diceyan view that the rule of law requires that government is subject to the same

²⁵ *Schelde*, para 25; *Southern Community Laboratories*, 16.

²⁶ [2007] NZAR 747.

²⁷ *Ibid*, paras 27-28. The English authority is discussed below.

²⁸ *Ibid*, para 30.

²⁹ *O’Leary v Health Funding Authority* [2001] NZAR 71 para 25.

³⁰ *Mercury*, 388.

rules as citizens.³¹ Secondly, it promotes freedom of contract by respecting the bargain between the parties.³² The reluctance of the Courts to interfere with the bargains struck through contracts was made very clear in *Schelde Marinebouw BV v Attorney-General*. Here Gendall J rejected an argument that the tender process for the construction of a navy ship was reviewable and concluded “[the plaintiff’s] rights are contained in the contract, which specifically provides that the Ministry may act in the way it did the plaintiff cannot seek to achieve by way of judicial review that which it cannot obtain by contract”.³³

The argument based on the primacy of private law remedies has recently gained greater prominence due to the acceptance by the New Zealand Courts that a request for tenders may result in the formation of a preliminary process contract.³⁴ In *Schelde* Gendall J held that the fact a process contract arose out of a tender process was a reason the decision was unreviewable:³⁵

the power being exercised in the present instance, whilst public in one sense as it involves the expenditure of public monies for the provision of naval vessels, it is still circumscribed by the process tender and that of contract, with the process having only private consequences as between Ministry and the tenderer, the processes “private” between the contracting parties.

As process contracts will frequently arise when government bodies engage in tender processes, Gendall J’s reasoning could be frequently replicated.

The argument based on the primacy of private law remedies can be taken further still by pointing to the protection offered to bidders’ interests outside of contract law. Firstly, tort law provides some potential avenues for disappointed bidders. In *Blackpool v Fylde Aerodrome*, an English process contracts case much like *Pratt* the Court noted that there was an albeit slim, possibility of liability in negligence.³⁶ In extreme cases of impropriety the tort of misfeasance in public office may also be

³¹ Sue Arrowsmith, *Government Procurement and Judicial Review* (1988), 14-15.

³² *Ibid*, 17-19.

³³ *Schelde*, para 33.

³⁴ *Pratt Contractors Ltd v Transit New Zealand* [2005] 2 NZLR 433; *Pratt Contractors v Palmerston North City Council Ltd* [1995] 1 NZLR 649.

³⁵ [2005] NZAR 356 para 25.

³⁶ [1990] 1 W.L.R. 1195, 1203 per Bingham LJ. However, in *Schelde* Gendall J held that the courts would be reluctant to impose a duty in tort where a contractual relationship did not provide for it: paras 35-39.

available.³⁷ Secondly, if a government body engages in misleading or deceptive conduct in tendering, a claim may be able to be brought under section 9 of the Fair Trading Act 1986.³⁸ Thirdly, a claim may be brought under Part Two of the Commerce Act if the government's conduct in its tendering amounts to a restrictive trade practice.³⁹

(iii) Third Argument: Corporatisation Legislation Impliedly Excludes Review

The courts have refused to review government tendering processes carried out by statutory bodies by developing the idea from *Mercury* that corporatisation legislation impliedly excludes judicial review. The Courts have accepted the argument that the point of corporatisation legislation is to allow statutory bodies to compete on a "level playing field" with the private sector.⁴⁰ On this view judicial review claims against the contracting decisions of corporatized entities are attempts to thwart the legislative intention that commercial decisions be in the hands of their boards and management, and that accountability occur elsewhere.⁴¹ Thus in *New Zealand Private Hospitals Association – Auckland Branch v Northern Regional Health Authority* Blanchard J held:⁴²

It would be quite intolerable if, in addition to rules of contract law and other principles of the general law (including equity), a statutory body of this type ... should also be subject to judicial review, including particularly an obligation to observe the principles of natural justice. Any trading organisation subjected to that requirement would be at a distinct disadvantage. I doubt very much that those who framed the health reforms would have intended that to be so.

³⁷ *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (2000) LGLR 372.

³⁸ *Gregory v Ragitikei District Council; New Zealand Private Hospitals Association; Pratt Contractors (CA); Schelde* para 40-44. Only in *Gregory* was such a claim successful.

³⁹ *New Zealand Private Hospitals Association*, 22-28. The plaintiffs claimed that the Northern Regional Health Authority was in breach of section 36 for having abused its dominant market position and in breach of section 27 by entering an agreement with the effect of substantially lessening competition. However both claims were unsuccessful.

⁴⁰ Janet McLean, "New Public Management New Zealand Style" in P Craig and Adam Tomkins (eds), *The Executive And Public Law* (2006).

⁴¹ Chen, M. "The Reconfiguration of the State and the Appropriate Scope of Judicial Review" in Boston (ed) *The State Under Contract* (1995), 112, 113.

⁴² HC, Auckland, M1629/95, 30 August 1996. Blanchard J at 13. Similar sentiments were expressed in *Business & Management Education & Training Services Ltd v Education & Training Support Agency* 30/8/1996, Anderson J, HC Auckland M1629/95, 13: "The courts recognise that where a public body is expected by Parliament to enter the market-place and compete with all comers then normal private law remedies and systems of accountability will apply".

The Courts have also argued that the presence of alternative accountability mechanisms in corporatisation legislation impliedly excludes review. In *Southern Community Laboratories* Eichelbaum CJ held that if the decision was criticisable the Crown Health Enterprise was responsible to the Minister and to Parliament.⁴³

(b) The *Lab Tests* Litigation

Last year the Court of Appeal gave its first major consideration of the reviewability of government contracts in over a decade in *Lab Tests Auckland v Auckland District Health Board*.⁴⁴ The decision in this case, like in *Southern Community Laboratories* concerned the award of a contract for laboratory testing services. A disappointed bidder, Diagnostic Medlabs, claimed that there had been a number of reviewable errors in awarding the contract. The most important for present purposes was an allegation there had been a breach of procedural fairness. The basic complaint was that one of the members of the DHB Board that made the decision had inappropriate ties to the winner of the contract, Lab Tests. Diagnostic Medlabs claimed the board member had a conflict of interest with regard to Diagnostic Medlabs and had misused confidential information to give Diagnostic Medlabs an advantage in the tendering process.⁴⁵

The decision clarifies some issues of the law relating to government contracts and generally affirms the approach of the lower courts outlined above. However, the decision should also be understood in relation to the very different decision of Asher J in the High Court at first instance so this will be outlined first.

(i) *Diagnostic Medlabs* – Challenging the Orthodox Approach

⁴³ *Southern Community Laboratories* 16.

⁴⁴ [2009] 1 NZLR 776.

⁴⁵ There was also a claim that the DHB was required to consult with Primary Health Organisations before awarding the contract and that it had failed to do so. This claim was upheld at first instance but dismissed on appeal. Diagnostic Medlabs also claimed that it had a legitimate expectation of consultation that was not fulfilled and that the decision was irrational. Neither of these claims were upheld at first instance or on appeal.

It was accepted by the defendants in *Diagnostic Medlabs* that the decision to award the contract was reviewable.⁴⁶ Nonetheless, Asher J still undertook a reviewability inquiry. Unsurprisingly, given the similarity in the issues involved the inquiry was based on the *Southern Community Laboratories Case*.⁴⁷ However, Asher J held that the decision was distinguished from *Southern Community Laboratories*. The *Southern Community Laboratories* Decision was made in the context of the Health and Disability Services Act, which “expressly brought a commercial edge to public health”.⁴⁸ However, under the Health and Disability Act 2000, which replaced the 1993 Act, and under which the contract in question was made there is no provision that DHBs must act comparably to businesses.⁴⁹ Accordingly, Asher J concluded the commercial context present in *Southern Community Laboratories* was gone and the decision could be reviewed.⁵⁰

Contrary to the orthodox approach, Asher J was much more willing to focus on the public service that would ultimately be provided by the contract to justify his conclusion that the contract was not just a commercial contract. Asher J emphasised that the decision was for a monopoly contract for a service that most of the Auckland public would use,⁵¹ and that laboratory services were an integral part of first contact care and were at the heart of primary medicine.⁵² Rather than seeing provisions dealing with conflicts of interest as an alternative accountability mechanism Asher J argued that they evidenced an intention from the legislature that District Health Boards’ commercial processes be subjected to higher standards of probity.⁵³

Having established that the decision was reviewable, Asher J considered the claim for breach of procedural fairness. His approach to the bias and conflict of interest claim also ran against the orthodoxy. The “level playing field” arguments employed in the orthodox approach to reviewability point towards a low standard of procedural fairness, if any standard is to be applied at all. However, despite acknowledging these arguments,⁵⁴ Asher J held that they were outweighed by the importance of the

⁴⁶ Ibid para 7.

⁴⁷ Ibid paras 12-14.

⁴⁸ Ibid, para 13.

⁴⁹ Ibid, para 14.

⁵⁰ Ibid.

⁵¹ Ibid, para 53.

⁵² Ibid paras 265-66.

⁵³ Ibid, para 55.

⁵⁴ Ibid, para 52.

decision to the Auckland public.⁵⁵ Rather than seeing the public interest as served by allowing the DHB to act commercially he argued stricter standards of procedural fairness were required to ensure the best possible decision was made and to ensure public confidence in the integrity of public office holders.⁵⁶

(ii) *Lab Tests* – Affirming the Orthodoxy

Diagnostic Medlabs was overruled unanimously in the Court of Appeal.⁵⁷ Arnold and Ellen France JJ gave the leading judgment. Hammond J wrote a concurring judgment that focussed on the wider theoretical issues the case raised about the current state of judicial review.⁵⁸ Despite expressing more concern over the concession of reviewability by the parties in the case,⁵⁹ Hammond J stated that he entirely agreed with the approach adopted by Arnold and Ellen France JJ.⁶⁰ Accordingly I will focus on the majority judgment.

Describing the majority's approach to reviewability is complicated because unlike Asher J the Court did not keep issues of reviewability, and the standard of procedural fairness to be applied, separate. Rather these issues were conflated under the heading "Standard of Procedural Fairness: scope of judicial review".⁶¹

This conflation is demonstrated by the statement of legal principles the Court derived from its review of the authorities:⁶²

[56] First, where a public body is involved in a commercial process, in this case seeking tenders and awarding a contract, that body must exercise its contracting power in accordance with its empowering statute, if there is one. Here the ARDHBs must (at least) comply with the requirements of s 25. If they do not, their contracting decision is susceptible to judicial review on the ground of illegality. None of the parties before us disputed this.

[57] Second, the procedural obligations of a body performing a public function

⁵⁵ *Ibid*, paras 53, 54, 208, 228.

⁵⁶ *Ibid*, para 54.

⁵⁷ [2009] 1 NZLR 776.

⁵⁸ *Ibid*, paras 348-405.

⁵⁹ *Ibid*, para 361.

⁶⁰ *Ibid*, para 348.

⁶¹ *Ibid* para 19.

⁶² *Ibid* paras 56-59.

will vary with context. So, a public body exercising a particular statutory power may be bound by natural justice obligations, but such obligations may have less, or even no, relevance to the same body when making another type of decision under statute.

[58] Third, “context” for these purposes 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. In the present case, the statutory provisions dealing with confidential information and conflict of interest assume critical importance.

[59] Fourth, the Privy Council’s decision in *Mercury Energy* indicates that the courts will intervene by way of judicial review in relation to contracting decisions made by public bodies in a commercial context in limited circumstances, although that is subject to the point about context just made. Generally other accountability mechanisms (such as ministerial control and parliamentary oversight) are likely to be seen as more appropriate.

The second and third points made by the Court of Appeal relate to determining the standard of procedural fairness required of a body, an inquiry normally reserved for considering whether the ground of procedural fairness has been made out. However, the fourth factor deals with the different question of whether a body is reviewable. The majority then applied this hybrid framework to conclude “neither *Mercury Energy* nor *Pratt Contractors* supports a broad-based ‘probity in public decision making approach’ of the type adopted by the Judge”.⁶³

However, Asher J’s “probity in public decision making approach” was in the context of determining the requirements of procedural fairness.⁶⁴ At this point Asher J had already decided that the decision was reviewable. Therefore, it is not clear why the majority used cases concerned with reviewability to refute Asher J’s conclusion on the requirements of procedural unfairness. The Court could simply have stated, as in *CREEDNZ Inc v Governor-General* or *Furnell v Whangarei High Schools Board*, that the statute provided a code of procedure that the Court could not add to and that Asher J was wrong to conclude otherwise.⁶⁵

Despite the confusion over reviewability the decision is a clear affirmation and clarification of the orthodox approach. The first point made by the Court of Appeal is

⁶³ *Ibid*, para 85.

⁶⁴ *Diagnostic Medlab*, paras 53-55.

⁶⁵ [1982] 2 NZLR 172 (CA); [1973] 2 NZLR 705 (PC).

a clarification insofar as it affirms that commercial decisions are reviewable for illegality and grounds analogous to fraud, corruption and bad faith. There had been doubts expressed as to whether the Privy Council in *Mercury* should be taken as excluding review for illegality so *Lab Tests* puts those doubts to rest.⁶⁶

The decision was a strong affirmation of the orthodox approach. Hammond J pithily summarises the way the Court characterised the tendering decision with his question, “should the courts allow what may be thought to be more like private law issues to be litigated in public law drag?”⁶⁷

The Court rejected Asher J’s approach to the legislation and did not accept that *Southern Community Laboratories* was distinguishable. Although there was no longer any express obligation on DHBs to behave like businesses, the Court implied from the legislation that tendering for service contracts was an area where DHBs were still expected to behave commercially.⁶⁸ As the statutory provision giving power to enter into service agreements did not include any direction on how they were to be negotiated the Court was unwilling to impose obligations when the DHB chose to proceed by way of tender.⁶⁹ The Court argued that to do so would hinder the ability of DHBs to negotiate contracts in the public interest.⁷⁰ The conflict of interest provisions were viewed as a code excluding the imposition of further obligations.⁷¹

The Court’s approach to presence of alternative accountability mechanisms also affirmed the orthodoxy. The Ministers’ power over membership and performance of DHB boards and the relatively short election cycle for DHBs were said to provide more appropriate accountability than judicial review.⁷²

Finally, the Court affirmed the primacy of private law remedies by opting for a particularly restrictive reading of *Pratt Contractors* to justify the finding that the

⁶⁶ *Vector Ltd (formerly Mercury Energy Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 paras 85-86.

⁶⁷ *Lab Tests*, para 405.

⁶⁸ *Ibid*, para 34.

⁶⁹ *Ibid*, para 87.

⁷⁰ *Ibid*, para 88.

⁷¹ Although not expressing a concluded view on the matter the Court also noted that the wider savings clause for contracts made in error by DHBs compared to the savings provisions available to DHBs under section 19-24 of the Crown Entities Act suggested that the Courts should take a cautious approach to judicial review. Whether the savings provisions in the NZPHD Act and Crown Entities Act should be read in this way will be considered in part B of Chapter III below: *ibid*, para 90.

⁷² *Ibid*, para 89.

decision was not reviewable. In *Pratt* the Privy Council held that although duties to act fairly could be implied into process contracts, these duties were not to be equated with the standards of fairness in judicial review.⁷³ Specifically, it rejected the conclusion in the High Court that an obligation to avoid apparent bias could be implied into a process contract. While accepting that there was no public law issue raised in *Pratt* the Court held that the Privy Council's "unwillingness to import public law notions into the contractual framework suggests that their Lordships saw the contractual framework as sufficient in itself".⁷⁴ Whether this can really be inferred from *Pratt* is open to question. The Privy Council was not considering the sufficiency of access to judicial review but the scope of obligations in process contracts, which would have implications for private law contractual disputes. Nonetheless, *Lab Tests* confirms the position taken in *Schelde*, that the potential presence of a process contract governing the tender process excludes judicial review.

Accordingly, after *Lab Tests* and in light of the case law preceding it the current New Zealand approach to the reviewability of government contracts may be summarised by stating that government contract award processes may be reviewable for fraud, corruption, bad faith or "analogous situations",⁷⁵ but they will not be reviewable for procedural fairness or on substantive grounds. With the exception of *Diagnostic Medlabs* the case law is notable for its uniformity. If the Supreme Court does get the chance to examine alternative approaches to government procurement it may have to look further afield.

B. The English Approach

1. The Public Element Test

The general rule for the review of contractual powers in England is that unless an additional "public law element" is present the decision will not be reviewable.⁷⁶ A

⁷³ *Transit v Pratt Contractors* paras 46-47.

⁷⁴ *LabTests*, para 60. Whether this can really be inferred from *Pratt* is open to question. The Privy Council was not considering the sufficiency of access to judicial review but the scope of obligations in process contracts, which would have implications for private law contractual disputes.

⁷⁵ *Ibid*, para 91. The Court of Appeal gave the example of "where an insider with significant inside information and a conflict of interest has used that information to further his or her interests to disadvantage his or her rivals in a tender".

⁷⁶ This rule applies outside of the procurement context, for example, to the regulation of market stalls and public sector employment. See the discussion of these categories in S Arrowsmith, "Judicial Review and the Contractual Powers of Public Authorities" (1990) LQR 277.

“public law element” has only been rarely found in the procurement context.⁷⁷ The leading cases are *R v Lord Chancellor ex parte Hibbit v Saunders* and *Mass Energy Ltd v Birmingham City Council*.⁷⁸ In *Hibbit*, despite finding that there had been a denial of a legitimate expectation, the Court of Appeal held that a decision to award a contract for court reporting services was not reviewable. Waller LJ held that if there was a statutory underpinning to the decision, such as a requirement that the contract be negotiated in a particular way then there would be a public law element.⁷⁹ The Courts would then be entitled to intervene on the basis of the breach of any statutory provisions.⁸⁰ Moreover, as the body would be exercising a statutory power the Court would be entitled to assess whether any procedural requirements were implied by the legislation.⁸¹ However, there was no such statutory underlay so Waller LJ held that the claim had to fail as the procedure was no different to an ordinary commercial transaction.⁸² Rose LJ did accept that the fact a commercial function is being performed did not take it out of the ambit of public law. However, Rose LJ followed this acceptance with:⁸³

[I]t is not appropriate to equate tendering conditions attendant on a common law right to contract with a statement of policy or practice or policy decisions in the spheres of Inland Revenue, immigration and the like, control of which is the especial province of the state and where, in consequence, a sufficient public law element is apparent.

Therefore, although Rose LJ’s approach may initially seem wider, because the judgment seemingly limits review to statement of policy or policy decisions concerning core state functions it leaves very little if any room for review of public procurement.

Mass Energy provides a similarly narrow basis for review. The case involved a tender for a waste disposal contract. Again, the Court of Appeal was unwilling to impose any obligations beyond those in the statute. Scott LJ held that the dispute was really a commercial one between a tenderer and a disappointed bidder.⁸⁴ Evans

⁷⁷ For a summaries of the jurisprudence see N Zar, “Public Procurement and Judicial Review” (2000). 5 *Jud Rev* 173.

⁷⁸ [1996] COD 326; [1994] Env LR 298.

⁷⁹ [1996] COD 326.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

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LJ held that in the face of legislative silence on the process to be taken, it could be assumed normal commercial processes would be appropriate.⁸⁵ This is similar to the approach in *Lab Tests* where as the statute gave no direction on how the power to negotiate service contract was to be exercised it was inferred that the DHB was to act commercially in negotiating them.

More recently, the English cases, influenced by the Privy Council decision in *Mercury* have expressed amenability to review in terms of amenability to particular grounds.⁸⁶ As in New Zealand, the courts have made it clear that review extends to illegality as well as fraud, corruption and bad faith.⁸⁷ However, also similarly to New Zealand there has been reluctance to extend to the substantive grounds or procedural fairness. The court in *R (on the application of Menai Collect Ltd) v Department for Constitutional Affairs* stated that in cases of fraud, corruption or bad faith there was a “true public element”.⁸⁸ Although the judgment in *Menai Collect* is not totally clear one reading of it is that the further the allegations are away from the grounds stated in *Mercury* the more other factors will be necessary to find a “public law element”.⁸⁹ Similarly, in *R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales* the Court, although finding that the decision could have been irrational, nonetheless refused review on the ground of irrationality.⁹⁰

Accordingly, much like the New Zealand approach, the dominant English approach characterises procurement as a commercial matter not suitable for judicial review.

2. Alternative Approaches

(a) Variations in the application of the public element test

Although the dominant English approach is similar to the New Zealand approach it suffers from more uncertainty. Three types of cases contradict the orthodox application of the test.

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⁸⁶ *Cookson & Clegg v Ministry of Defence* [2005] EWCA Civ 811, para 18; *R (on the application of Menai Collect Ltd) v Department for Constitutional Affairs* [2006] EWHC 724, paras 24-27.

⁸⁷ *Cookson & Clegg v Ministry of Defence* [2005] EWCA Civ 811 para 18.

⁸⁸ *Menai Collect*, para 42.

⁸⁹ Davies, “The Public Law of Government Contracts” (2008), 160.

⁹⁰ [2006] EWHC 2167 (Admin), para 77.

The first are cases that concern challenges to decisions by public authorities to take contractors off lists of approved contractors. Thus in *R v London Borough of Enfield ex p. TF Unwin (Roydon Ltd)* the Court of Appeal held it was unfair to remove a contractor from an approved list of contractors without first telling it the nature of the allegations made against it that had led to its removal.⁹¹ *Unwin* is difficult to reconcile with the usual approach as it is hard to see how a decision to remove a contractor from a list of tenderers has a greater public element than a decision not to award a particular contract to a tenderer.⁹² The end result is the same and although there is a greater effect on the contractor in the former case it is hard to see how this has any greater public effect. Although *Unwin* is an older case an argument that *Unwin* should be confined to its particular statutory context was recently rejected on the basis that it remained binding Court of Appeal authority.⁹³

The second inconsistency is the treatment of cases where a government body has attempted to implement a policy through its contract. In *R v Lewisham London Borough Corporation ex p. Shell UK Ltd* a council's policy of boycotting Shell for its links with South Africa was held to be unfair and for an improper purpose.⁹⁴ Although not in the procurement context, other cases on the reviewability of contractual powers of public authorities support the position in *Shell*. The fact that a council was not merely exercising a power under a contractual lease but "seeking to give effect to its planning policy through the contract" justified review in *R (on the application of Molinaro) v Kensington RLBC*.⁹⁵ The fact a contract was implementing a policy was also used to allow review of an employment contract in *R (on the application of A and B Council)*.⁹⁶ However, it is extremely difficult to draw the line between a policy and an operational decision so the approach in *Shell* is likely to add confusion to the functional test.⁹⁷

⁹¹ [2006] EWHC 724.

⁹² Sue Arrowsmith, "Judicial Review of Public Procurement: The Recent Decisions In the *National Lottery Case* and *R v Bristol City Council, Ex P. D. L Barrett*" (2001) *PPLR* NA41-46.

⁹³ *R v Bristol City Council ex parte (D L Barrett & Sons)* (2001) 3 L.G.L.R 11 (QBD) para 44

⁹⁴ [1988] 1 All ER 938.

⁹⁵ [2001] EWHC Admin 896 para 63.

⁹⁶ [2007] EWHC 1529 para 28.

⁹⁷ S H Bailey "Judicial Review of Contracting Decisions" (2007) *PL* 444, 463.

It is even harder to reconcile the decision in *R v Legal Aid Board ex parte Donn & Co* with the orthodox approach.⁹⁸ Here, Ognall J held that the award of a contract by the legal aid board to conduct multi-party litigation on behalf of gulf war veterans was reviewable. Ognall J held that whether a public element was present due to the importance of the function to the war veterans and the consequences on the court system.⁹⁹ *Donn* is difficult if not impossible to reconcile with *Hibbit*.¹⁰⁰ It could equally have been said in *Hibbit* that court transcript services were important to the court system.¹⁰¹ Accordingly, it illustrates an alternative approach to that taken in *Hibbit*. Ognall J focussed on the overall purpose of the procurement rather than its commercial form. His focus on the importance of the contract to the public is similar to Asher J's in *Diagnostic Medlabs*.

(b) Rejection of the functional test

The most radical departure from the orthodox approach to review of the exercise of contractual powers is set out in *Molinaro*. Although Elias J held the decision to be reviewable because of its policy content he also went further and expressly rejected the idea that a public element was required for review.¹⁰² Elias J held:¹⁰³

In my view, the fact a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused...public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring they are not abused.

Although the case concerned a lease rather than a procurement contract, the approach would be equally applicable in the procurement context because, as mentioned above, the public element test determines reviewability in both the procurement and leasing contexts in England. Elias J qualified his comments by noting that often the complaint would identify no public law principle.¹⁰⁴

⁹⁸ [1996] All ER 1. See for difficulties with reconciling *Donn* with the other case law: Sue Arrowsmith, *The Law of Public and Utilities Procurement* (2nd ed) (2005), 83; A C L Davies, (2008), 158.

⁹⁹ [1996] All ER 1, 11.

¹⁰⁰ A C L Davies, (2008), 158

¹⁰¹ *Ibid*.

¹⁰² [2001] EWHC Admin 896 para 63.

¹⁰³ *Ibid*, paras 64-67.

¹⁰⁴ *Ibid*, para 66.

Elias J's approach represents a radical departure from the orthodox English position. Its approach is institutional rather than functional. It is in line with a body of academic opinion that argues that the fact a body is a government body allows it to be reviewed on all grounds regardless of the function it is undertaking.¹⁰⁵ However, this view also holds that the intensity of review may be lowered or negated at the grounds stage by specific policy factors, such as the need to compete with private enterprise.¹⁰⁶

Accordingly, although the English jurisprudence is broadly similar to the New Zealand jurisprudence, analysis of it reveals a range of alternative approaches that could act as persuasive authority in the future for the adoption of a new approach to government contracting in New Zealand.

¹⁰⁵ S. Arrowsmith "Judicial Review and the Contractual Powers of Public Authorities" (1990) LQR 106 277; SH Bailey "Judicial Review and the Tendering Process" (2007) *PPLR* NA 11-20, NA 18-20.

¹⁰⁶ S. Arrowsmith "Judicial Review and the Contractual Powers of Public Authorities" (1990) LQR 106 277, 291. 445-446.

Chapter II – Refutation of the Current New Zealand Approach to Reviewability of Government Tender Processes

A First Argument: Characterisation of government contracting as a “commercial” function

The key to refuting the current functional approach to reviewability of government contracting decisions is set out by Elias J in *Molinaro*. Elias J justified the institutional approach by stating:¹⁰⁷

public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring that the powers are not abused. I see no reason in logic or principle why the power to contract should be treated differently to any other power.

This statement directly contradicts the functional approach which holds that the government must respect public law values only when government exercise coercive or regulatory powers or those that limit rights.¹⁰⁸

It is submitted that the stronger argument is that set out by Elias J. It recognises that unlike private actors, the government is only entitled to act in the public interest, indeed it has no other interest.¹⁰⁹ The notion that the state can act with no regard to the public interest is contrary to the liberal democratic traditions of common law systems.¹¹⁰

The consequence of the functional approach that the government can disregard the public interest is also inconsistent with the basis of administrative law. There is wide

¹⁰⁷ [2001] EWHC Admin 896 para 67.

¹⁰⁸ K Johnston and P Davidson, “The *Medlab* decision” (2008) *NZLJ* 446, 448. See also Cane, *Administrative Law* (4th ed) (2004), 4.

¹⁰⁹ D. Oliver, “Is the Ultra Vires Doctrine the Basis of Judicial Review?” (1987) *PL* 543 at 562.

¹¹⁰ O’Byrne, S K, “Public Power and Private Obligation: An analysis of the Government Contract” (1991-1992) 14 *Dalhousie Law Journal* 485, 491-492; Dawn Oliver, *Common Values and the Public Private Divide* (1999), 4-9, 112-117.

agreement that the stricter duties imposed on public authorities by administrative law are justified because of the disparity in power between public and private actors.¹¹¹

It is true that such statements are usually directed towards the coercive and regulatory powers of government. However, that governments may use their immense wealth and purchasing power to impose conditions on contractors that go beyond the objectives of securing a particular good or service and contribute to wider policy goals and regulation.¹¹² This may occur, firstly, by a government refusing to deal with firms that do not implement its policies. An example is the British Government's decision to "blacklist" firms who refused to comply with the government's incomes policy.¹¹³ Secondly, governments may include terms in contracts that achieve policy goals. A current New Zealand example is the "Australia and New Zealand Framework for Government Procurement". Under this agreement government bodies in Australia and New Zealand are encouraged to choose products with the least environmental impact and foster relationships with suppliers who are sustainable producers.¹¹⁴

As the objective and result of the implementation of policy by a statutory regime or by contractual relationships is the same, the implementation of policy by contractual means should be similarly subject to review.¹¹⁵ Accordingly, the functional test as

¹¹¹ P Cane, "Mapping the Frontiers" in P. Birks (ed) *The Frontiers of Liability Volume 1* 137, 143; M Taggart, "The Peculiarities of the English': Resisting the Public/Private Law Distinction in P Craig and R Rawlings (eds) *Law and Administration in Europe Essays in Honour of Carol Harlow* Oxford University Press, New York (2003), 107. N Bamforth "The Public-Private Law Distinction: A Comparative and Philosophical Approach" in P. Leyland and T Woods (Eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997) 151-153.

¹¹² T Daintith, "Regulation by Contract: The New Prerogative", (1979) *Current Legal Problems* 42; Carol Harlow and Richard Rawlings, *Law and Administration* (2nd ed, 1997); 137-139; Peter Trepte, *Regulating Procurement Understanding the Ends and Means of Public Procurement Regulation* (2004) 137-139; C Harlow, "The 'Hidden Paw' of the State" in D Dyzenhaus, M Hunt and G Huscroft (eds) *A Simple Common Lawyer Essays in Honour of Michael Taggart* (2009) 75, 90; J Auby "Comparative Approaches to the Rise of Contract in the Public Sphere", (2007) *PL* 40, 43.

¹¹³ Ibid, Daintith "Regulation by Contract".

¹¹⁴ Australian Procurement and Construction Council, *Australian and New Zealand Government Framework for Sustainable Procurement*, 11-12.

¹¹⁵ Carol Harlow and Richard Rawlings, *Law and Administration* (2nd ed, 1997), 244; A C L Davies, *The Public Law of Government Contracts* (2008), 68-69, 162; PP Craig, *Administrative Law*, (2008), 884-885. Accordingly, Craig has suggested that the functional test be modified to inquire whether the government is performing some manner of regulation in its contracting. Although this would be an improvement on the present state of affairs for the reasons outlined the functional test should be rejected altogether.

currently drawn is deficient insofar as it does not recognise that government may implement policy through use of contractual power.¹¹⁶

Moreover, the markets where government contracting takes place often do not approximate private sector markets.¹¹⁷ Vincent-Jones has pointed out that much government contracting takes place in “quasi-markets”.¹¹⁸ Like private markets these markets do involve competition between purchasers. However, there is often a monopoly supplier in the form of a government purchasing agency or only a limited range of suppliers.¹¹⁹ Due to its monopoly or near monopoly position the government purchaser has far more control over the market than it would if it was a supplier in a typical commercial market. Moreover, the supply of the service is determined by the perception of the executive rather than the aggregation of consumer preferences through purchasing.¹²⁰ This further undermines the private sector analogy assumed by characterising government contracting as a “commercial activity”.

Accordingly, the ability of government to use its wealth to achieve policy goals and the often privileged position of government purchasers in quasi-markets, contracting powers sets its contracting power apart from that of private citizens and justifies it being held to a duty to protect the public interest when it is contracting.

Recognising the duty of the government to act in the public interest when contracting justifies the application of administrative law standards as they reflect the duty of the government to act in the public interest. Taggart notes that the “point of departure for administrative law is the primacy of public-regarding (or other-regarding behaviour)”.¹²¹ The principles of judicial review promote values such as “openness,

¹¹⁶ Although cases in England such as *Shell, Molinaro* and *A v B Council* recognise this point by allowing review where policy is at stake they are generally viewed as exceptions to the usual test. Accordingly, Craig has suggested that the functional test be modified to inquire whether the government is performing some manner of regulation in its contracting. Although this would be an improvement on the present state of affairs for the reasons outlined below the functional test should be rejected altogether.

¹¹⁷ M Freedland, “Government by Contract Re-examined – Some Functional Issues” in P Craig and R Rawlings (eds) *Law and Administration in Europe Essays in Honour of Carol Harlow* (2003),

¹¹⁸ Peter Vincent-Jones, *The New Public Contracting* (2006) 180-199, 204.

¹¹⁹ *Ibid*, 204.

¹²⁰ *Ibid*.

¹²¹ M Taggart, “The Province of Administrative Law Determined?” in Taggart (ed) *The Province of Administrative Law* (1997) 3. This opinion has found judicial expression though Laws LJ in *R v Somerset Council, ex parte Fewings* [1995] 1 All ER 513, 524: “[F]or public bodies the rule is ... that any action to be undertaken must be justified by positive law. A public body has no heritage or legal rights which it enjoys for its own sake.”

fairness, participation, accountability, honesty and rationality”.¹²² Requirements to provide opportunities to participate in decision making, to avoid bias and to justify actions then reflect the fact that government acts on behalf of citizens.¹²³

Some of the underlying rationales of principles of procedural fairness also demonstrate that they are appropriately applied to in the government contracting context. One of the rationales for procedural fairness is to promoting trust and confidence in government.¹²⁴ This justification does not link to a particular activity of government but the need for government authority to appear to be legitimate.¹²⁵ An argument that this justification for procedural fairness does not apply to government contracting is implausible. It is unrealistic to think that faith in government will be any less shaken by unfair contracting practices than, for example, the unfair issuing of resource consents.

Accordingly, principles that promote this trust and confidence such as legitimate expectation and procedural fairness should not be shut out at the reviewability stage simply because the government is contracting.

It is even harder to defend the idea that because the government is contracting, it should be allowed to act irrationally. If it may act irrationally this assumes it can act contrary to the public interest. Moreover, the rationale behind refusing to apply review standards to government contracting would seem to be that the government must be free to exercise commercial judgment. But freedom to exercise commercial judgment is not the same as freedom from an irrationality standard. Indeed a necessary part of good commercial judgment would seem to be acting in an economically rational manner.

Finally, recognising that the government has a duty to act in the public interest regardless of the function it is performing reveals, as Bailey has pointed out, that the use of the functional test in the context of award procedures is inconsistent with the reasons for its development.¹²⁶ The functional test for review was developed in order

¹²² Ibid.

¹²³ Davies, above n 3, 67.

¹²⁴ The promotion of trust and confidence may also serve as a basis for legitimate expectation. As a basis for legitimate expectation see Søren Schønberg *Legitimate Expectations in Administrative Law* 24-25 (2000).

¹²⁵ Ibid,

¹²⁶ S H Bailey “Judicial Review of Contracting Decisions” (2007) *PL* 444, 447.

to bring bodies that were not part of government as defined by the then dominant institutional test for reviewability into the ambit of public law.¹²⁷ Requirements that the decision have a “public law element” and is not commercial are obviously necessary when reviewing such bodies in order to somehow limit the scope of public law. However, in the case of government bodies the requirement to always act in the public interest justifies review and it is not necessary to further limit review by resort to a functional test.¹²⁸

1. The benefit of an institutional approach – more precise review

As well as being supported by the government’s duty to act in the public interest, the adoption of an institutional approach to government contracting would solve problems with the imprecision of the current public element test. The current approach suffers from imprecision as on the one hand it seems clear that the approximation of public sector contracting to the private sector contracting is a matter of degree affected by the purpose of the contracting and the market it takes place in. Indeed, the current approach itself recognises that deciding whether a decision is public or private is a matter of degree. The very fact that it is based on a spectrum suggests that anything between the two poles will present a mix of public and private elements and the extent to which government contracting is public or private is a matter of degree in any case. However, the reviewability test does not work in degrees. It is binary. Accordingly, the courts currently lack a sophisticated method to take both the public and private concerns of government in contracting into account.¹²⁹ Rather, the Court has to decide whether the contract is more public than private or vice versa. If the Court decides that the decision is more private than public then it is not reviewable. This is problematic as it may well be that the decision has a number of public elements that end up not being accounted for as they are less prevalent than the private elements. These elements can only be accounted for if it is possible for the court to reflect the degree of public concerns in a contracting decision in a sliding scale.

The adoption of an institutional approach to review would overcome these difficulties. If the reviewability test were satisfied by the fact the body in question was a

¹²⁷ Ibid.

¹²⁸ Ibid, 447.

¹²⁹ M R Freedland, “Government by Contract and Public Law”, (1994) *PL* 86, 101.

government body then the varying intensity of review could be used to accurately reflect the balance between public and private concerns engaged by the government tender process.

Such an approach would allow for better use of factors that are currently used in classifying a decision as commercial or public. For example, as discussed in the first chapter currently, the fact a body is operating in a competitive market place is often decisive in determining that it is exercising a “commercial” function. However, as Vincent-Jones’ analysis of “quasi-markets” has shown whether a government body can truly be said to be entering a competitive market is far too complex a question to be answered by the application of the binary commercial/non-commercial dichotomy. The need to negotiate should be balanced against factors such as the market power of the government and the structure of the market. As Vincent-Jones points out such markets only mimic private markets to a degree and contain a mix of private and public regulatory elements.¹³⁰ It is this degree of private market mimicry that should be investigated and reflected in the standard of review rather than being excluded at the outset by the reviewability test.

Accordingly, the use of the current functional test that characterises government contracts as a commercial function should be rejected in favour of an institutional test as outlined in *Molinaro*.

B Second Argument – The Primacy of Private Law Remedies

The forgoing discussion also undermines the argument of the courts that if private law remedies govern aspects of the tendering process they should not be interfered with by judicial review. It is true that bidders receive a range of protections under private law. However, as argued above the duty of the government to act in the public interest means that government contracting should be held to different, public law standards than private sector contractors. Private law protections are not equivalent to the protections offered by public law. The decision in *Pratt Contractors* held that public law standards were not to be implied into process contracts.¹³¹ Similarly, although tort law and the Commerce Act provide a degree of protection for

¹³⁰ Peter Vincent-Jones, *The New Public Contracting* (2006) 204.

¹³¹ *Transit v Pratt Contractors* paras 46-47.

bidders these protections only protect bidders from extreme forms of market hardship in order to ensure that the market functions.¹³²

CThird Argument: Corporatisation legislation impliedly excludes judicial review

As was seen in the first chapter the courts have read legislation that corporatizes public service provision as excluding judicial review. If this interpretation of the legislation is correct it will trump the arguments made in the first part of this chapter as the Courts cannot disobey Parliament.

However, the acceptance that the nature of the state sector reforms and the scheme of legislation setting up state trading entities impliedly excludes review is open to question. Firstly, because like the characterisation approach discussed above, it is applied at the reviewability stage, it relies on a binary distinction between commercial and non-commercial activities. Accordingly, the use of an implied legislative intention that SOEs or DHBs be immune from review in their contracting functions is open to a similar criticism for the failure of the characterisation approach to recognise the degrees of “publicness” and “privateness” involved in a particular government contract award process. If the argument that government does have a duty to act in the public interest in its contracting decisions made above is accepted then the fact that the legislature retains some role for the government in the provision of the service suggests that review should not be entirely excluded.¹³³

In any case New Zealand’s corporatisation legislation is distinctly ambiguous. Taggart points out that the drafting history of the State Owned Enterprises Act reveals that a privative clause was removed from the original Bill. The clear implication from this is that review was to be available. Moreover, as Taggart again points out the courts’ interpretation of the corporatisation legislation ignore the fact that the “level playing field” argument did not prevail in Parliament when SOEs were made subject to the Official Information and Ombudsmen Acts.¹³⁴

¹³² O’Byrne, Shannon Kathleen, “Public Power and Private Obligation: An analysis of the Government Contract” (1991-1992) 14 *Dalhousie Law Journal* 485, 489.

¹³³ Mullan, “Administrative Law at the Margins” in Taggart (ed) *The Province of Administrative Law* (1997).

¹³⁴ M Taggart “State Owned Enterprises and Social Responsibility: A Contradiction in Terms?” (1993) *NZ Recent Law Rev* 343, 353-355.

Of course identifying some factors pointing against the courts' interpretation of corporatisation legislation does not mean that the interpretation is incorrect. It may be that overall, it can be implied from the legislation that Parliament intended to exclude review. However, the idea that review can be impliedly excluded is highly problematic. The courts show no such acquiescence of their jurisdiction when it is excluded by privative clauses. It is difficult to see the justification for the difference in approach in respect of privatisation legislation. Pointing to a legislative intention that boards and managers of state trading enterprises have commercial freedom in the name of more efficient and effective government is not enough. The point of every privative clause is to free decision makers from the restrictions of judicial review. In *Zaoui v A-G* an argument that the Court should infer from the legislative context of a privative clause under the Inspector-General of Intelligence and Security Act 1996 that it should be read less strictly was given short shrift.¹³⁵

Nor should the presence of other accountability mechanisms in legislation setting up state trading entities or accountability through the political process be said to impliedly exclude review. It is true that privative clauses that provide for an appeal procedure are respected by the courts. So, in a sense the presence of an alternative remedy can be said to exclude review. However, the Courts have gone no further than this as the reason appeal procedures are effective to exclude review is they provide an alternative for judicial enforcement of individual rights.¹³⁶

The alternative accountability mechanisms argued to justify the exclusion of review in the context of state trading activity are of a totally different order to an appeal to the courts. Judicial review provides the potential for a legally enforceable remedy to an aggrieved individual for a particular wrong. Assuming, judicial review would be otherwise justified, political processes are a poor substitute. Processes allowing

¹³⁵ *Zaoui v Attorney-General* [2005] 1 NZLR 691. The Crown subsequently appealed the case but not on the privative clause point. Subsection 19(9) of the Inspector-General of Intelligence and Security Act provides: "Except on the ground of lack of jurisdiction, no proceeding, report, or finding of the Inspector-General shall be challenged, reviewed, quashed, or called into question in any Court". In the Court of Appeal, Anderson P held "the bold submission that the High Court's supervisory jurisdiction in respect of the exercise of any statutory power, on the grounds of error of law, can be excluded at all, let alone by inference, is essentially untenable": *ibid*, para 16. Glazebrook J held "it is true there is an emphasis on speed in the statutory scheme but allowing a review to proceed on a totally wrong basis would in the long run cause as many delays as allowing review at this stage" and refused to accept a submission that the statute provided entirely for the process to be followed thereby excluding review: *ibid* paras 102-103.

¹³⁶ Indeed, any restrictions on appeal rights point towards judicial review being available so that all individual rights may be vindicated: *ibid* 104.

Ministers to control and punish boards and board members such as those identified in *Lab Tests* can do nothing to undo the effect of a wrongly awarded contract.

Moreover, such processes rely on persuading the Minister to intervene.

Accountability through the ballot box is even more problematic. Firstly, the accountability is only intermittent.¹³⁷ Secondly democratic processes hold bodies to account for their overall performance, not individual decisions. Thirdly, an aggrieved person cannot use a democratic process to hold the government to account alone; they may be outvoted by their peers.

Moreover, the New Zealand Bill of Rights Act 1990 supports the analysis so far. A right to judicial review is guaranteed under section 27(2) of the Act. Under section 6 of the NZBORA, other enactments must be given an interpretation consistent with the rights enumerated in the NZBORA. There is no express exclusion of judicial review in the legislation setting up state trading entities. Accordingly, section 6 would seem to be apposite. The absence of any direction on the availability of judicial review is inherently ambiguous so the most rights consistent meaning that can be given to the Act is that review is not excluded.

Accordingly, corporatisation legislation does not support the claim that government contracting decisions are unreviewable. It is far more appropriate for the statutory context to be taken into account at the grounds stage where the balance of features of the Act pointing for and against review can be reflected in an appropriate intensity of review.

D Objections to the Adoption of an Institutional Approach to Review of Government Contracting

1. Uncertainty

The first potential objection to the approach to reviewability outlined so far is that a contextual approach would be too indeterminate for the commercial concerns at stake in procurement. However, the “public element” and “commercial” tests are inherently uncertain. Judges in England and New Zealand have admitted that their application is no more than a matter of impression.¹³⁸ They are conclusory labels

¹³⁷ A C L Davies, *The Public Law of Government Contracts* (2008), 67.

¹³⁸ *R v Legal Aid Board ex parte Donn & Co* [1996] All ER 1, 11. ; *He Putea*

that do not provide any advance guidance on how they are to be applied in a particular case.¹³⁹ This means that it will always be possible to selectively emphasise aspects of the subject matter at hand to conclude that the activity fits into a particular category without revealing the true reason it has been chosen. On the other hand, a contextual approach forces identification and balancing of the competing factors to determine an appropriate level of review. This provides clearer guidance for future cases and ensures transparency in judicial reasoning

2. Judicial Review is procedurally incapable of handling commercial disputes.

A second potential objection is that is that judicial review is procedurally incapable of handling commercial disputes. The Court of Appeal complained in *Lab Tests* that the factual subtleties involved in claims such as the one litigated in *Lab Tests* were too great to be dealt with on a judicial review application.:¹⁴⁰

However, the evidential problems may be more a function of the Courts' approach to commercial issues than the nature of the issues themselves. Judges in the United Kingdom have recognised that the "public element" test cannot be applied without a close examination of the facts.¹⁴¹ Given the uncertain nature of the "commercial" and "public element" tests it is unsurprising that counsel tend to submit a lot of evidence in the hope that some of it will cause the Court to find that the case is suitable for review. As suggested above the approach advocated in this paper should result in more certainty. It would allow the Court to focus its attention on particular errors and particular grounds of review.¹⁴²

Moreover, the courts are able to make more use of their control of pre-trial processes.¹⁴³ Where the court determines that a low intensity of review is appropriate the courts could limit discovery proceedings by requiring the plaintiff to clearly articulate the error and then limit the focus of evidence at that point.¹⁴⁴ For example, the Court could refuse to hear experts as if it is likely a reputable expert

¹³⁹ Craig, "Public Law and Control over Private Power", 200.

¹⁴⁰ *Lab Tests Auckland v Auckland District Health Board* [2009] 1 NZLR 776, para 342.

¹⁴¹ *Menai Collect Ltd v Department for Constitutional Affairs* [2006], paras 23 and 42; *Gamesa Energy*[2006] EWHC 2167 (Admin) paras 68 and 77. See S H Bailey "Judicial Review of Contracting Decisions" (2007) *PL* 444, 462-463.

¹⁴² S H Bailey "Judicial Review of Contracting Decisions" (2007) *PL* 444, 462-463.

¹⁴³ J Palmer and K Wevers "Judicial review in a commercial context" (2009) *NZLJ* 14, 16.

¹⁴⁴ *Ibid.*

can be called from each side it is unlikely that the decision could be said to be irrational.¹⁴⁵

3. Alternative administrative accountability mechanisms are better suited to deal with government contracting

A third objection would be to argue that the public values engaged in procurement should may be catered for by alternative administrative law remedies. Specifically, the Official Information Act and the ombudsmen have been argued to provide potentially suitable remedies.¹⁴⁶ The main reason for using these alternative remedies would be concern over the potential for disruption caused by public law remedies. It is argued in the next chapter that the potential disruption caused by setting aside a contract does not justify withholding review at the reviewability stage, although it may affect the discretion over remedies.

However, there are other reasons alternative administrative remedies are unlikely to be sufficient. Taking the Official Information Act first, it is true that the Act provides many opportunities for information on government tendering processes to be obtained.¹⁴⁷ However, arguing that there is scope to receive information begs the question to what use it can be put. Rights to reasons are typically justified by their instrumental effect in allowing decisions to be challenged.¹⁴⁸ However, as already seen, in the procurement context, political mechanisms of accountability are likely to be ineffective.

The ombudsman also has jurisdiction to investigate substantive complaints about the tendering process. However, reliance on the ombudsman to enforce accountability in the tendering process is highly problematic. First, the role of the ombudsmen is to supplement rather than replace existing administrative law methods.¹⁴⁹ Secondly, the

¹⁴⁵ Ibid.

¹⁴⁶ M. Aronson "A Public Lawyer's Response to Privatisation and Outsourcing" in Taggart (ed) *The Province of Administrative Law*, 40, 58-63.

¹⁴⁷ The Ombudsmen have made it clear that under section 23 disappointed bidders have a right to reasons why they were unsuccessful in their bid. The Ombudsmen will also generally allow requests that are only for total tender prices or the identity of a successful tenderer. 1. Although, the Ombudsmen accept that where a request for information will disclose the pricing strategy of a tenderer it may be withheld under section 9(2)(b)(ii). See Satyanand, A, Smith, M, Belgrave, M, "Editorial: Complaints about Public Tender Processes" (2004) 10(3) *Ombudsman Quarterly Review*

¹⁴⁸ P. P Craig "The Common Law, Reasons and Administrative Justice" (1994) 53 *Camb LJ* 282, 283-289.

¹⁴⁹ A Satyanand, "The Role of the Ombudsman" [1996] *NZLJ* 206.

fact that the ombudsmen can only make non-binding recommendations, applies a very general standard of fairness to determine complaints and has no system of binding precedent is likely to make the ombudsmen process too uncertain for the commercial concerns at stake in procurement.

4. Judicial Review should not be used for Commercial motives

Finally, it might be argued that judicial review should not be used to further commercial motives. However, as will be seen the motives of the applicant can be taken into account at the remedies stage. This is a far more appropriate stage for them to be taken into account because regardless of the motives of the applicant there is a public interest in the correction of administrative errors both to ensure that good decisions are made about public procurement and to promote confidence in government. It is also questionable whether it is for the courts to make a value judgment about the plaintiffs motives about bringing the claim if they have been legally wronged.¹⁵⁰

¹⁵⁰ T Bingham, "Should Public Law Remedies be Discretionary?" [1991] *PL* 64, 71.

Chapter III – Consequences of a finding of Reviewable Error

As alluded to at the start of this paper in order to determine whether government contracting should be amenable to review it is necessary to consider the consequences of a finding that a reviewable error has occurred. Part A of the chapter examines the approach

A Common Law

1. Potential Problems

Judicial review remedies do present problems for the argument that judicial review of government contracting should be more expansive. If a Court finds that there has been a reviewable error it has discretion over whether to issue a remedy. If the Court does decide to issue a remedy then the decision is void. This causes a problem in the government tendering context as if a successful review application occurs after a contract has been entered into its effect is to invalidate the decision to enter the contract. The result is that the contract too is void.¹⁵¹ Voiding a concluded contract may cause a range of problems for the contractor. The contractor may have commenced the project, incurred expenditure or made other contracts or commitments based on the contract with the government body.¹⁵² Moreover, setting aside a contract may result in significant disruption of public services. The problems with the remedy are compounded by the fact that competitors of the contractor awarded the contract are incentivised to bring a judicial review claim to further their commercial motives. Therefore, it might be argued that a wider approach to reviewability would result in a flood of unmeritorious claims from disappointed bidders claiming minor errors in an effort to get the contract for themselves. These

¹⁵¹ *Martin v Ryan* [1990] 2 NZLR 209; *Petrocorp Exploration v Minister of Energy* [1991] 1 NZLR 641, 652; *Crédit Suisse v Allerdale Borough Council* [1996] 4 All ER 129. The point was recognised by Asher J in *Diagnostic Medlabs*. Asher J held that his decision to grant a remedy meant that the contract was “wholly void”: para 360. See for discussion P. Mitchell ‘The Crown, Public Authorities and the European Community’ in H.G Beale (ed) *Chitty on Contracts* 3 (30th ed) (2008), p. 772.

¹⁵² G M MacMillan “Judicial Review, Competitors and the Court’s Discretion to Withhold a Remedy” (1995) NZLR 192, 192-193.

consequences may in turn make parties less likely to contract with the government and cause them to raise prices.¹⁵³

However, as I will develop below the Courts' remedial discretion, the possibility of restitutionary relief and the possibility of relief under the Illegal Contracts Act can all mitigate the difficulties with the remedies.

2. Flexibility of remedies

The discretion over remedies is the most obvious way to alleviate hardship to contractors. Hardship to third parties is routinely taken into account in cases where the invalidation of a contract may cause hardship to third parties.¹⁵⁴ The hardship may be weighed against the gravity of the error.¹⁵⁵ In *Pacer Kerridge Cinemas v The Hutt City Council* relief was refused as the successful tenderer for the development of a movie complex had entered into construction contracts and contracts for equipment and fittings.¹⁵⁶ The Courts also take into account undue delay in bringing proceedings for judicial review, especially if it causes loss to the respondent.¹⁵⁷

The discretion over remedies also takes into account the wider interests of the public in avoiding administrative disruption. *Ritchies Transport Ltd v Otago Regional Council* provides an example in the procurement context.¹⁵⁸ Here Citibus Ltd challenged the validity of a tender process for bus contracts adopted by the Otago Regional Council that had resulted in most routes going to their competitor, Ritchies. However, after the proceeding was filed, the Otago Regional Council reversed its decision, giving most of the route to the Otago Regional Council. As a result, Otago changed its pleadings from trying to set aside the contract to trying to uphold it while Ritchies did the reverse. The Court of Appeal held that as the errors were relatively

¹⁵³ Of course it is entirely possible to challenge the award of a contract before it is entered into, in which case there are no problems in granting a remedy, apart from perhaps minor disruption to public services if the tendering process is held up by the litigation: A C L Davies, *The Public Law of Government Contracts* (2008), 108.

¹⁵⁴ *Calvert & Co v Dunein CC* [1993] 2 NZLR 460 at 474; *Martin v Ryan* [1990] 2 NZLR 209 ; *Auckland Casino Ltd v Auckland Casino Authority*; *Baker v Queenstown District Council* [2006] NZAR 716. For discussion see P A Joseph *Constitutional and Administrative Law in New Zealand* 1105-1106.

¹⁵⁵ *Auckland Casino Ltd v Auckland Casino Authority* [1995] 1 NZLR 142; *Baker v Queenstown District Council* [2006] NZAR 716.

¹⁵⁶ *Pacer Kerridge Cinemas Ltd v The Hutt City Council* (18/12/92, Williams J, HC Auckland M 896/92, 21-22.

¹⁵⁷ *Turner v Allison* [1971] NZLR 833 (CA); *West Coast Province of Federated Farmers Inc v Birch* 16/12/83, CA 25/82, 7-8, 13 per Cooke, Somers and Casey JJ .

¹⁵⁸ CA 152/91, 16/8/91 (Casey, Hardie Boys and Gault JJ).

minor relief could not be granted due to public inconvenience from a change of operator and timetable and commercial uncertainty.¹⁵⁹

Ritchies also illustrates how the Courts have shown themselves capable of responding to the potential problems caused by unmeritorious claims by competitors. In *Ritchies* Gault J held “We do not consider we should assist public bodies to blow hot and cold with allegations of invalidity depending upon commercial gains and losses”.¹⁶⁰ In other contexts where the claim has been motivated primarily by commercial concerns the Courts have had regard to the commercial motive of the competitor in refusing relief.¹⁶¹ In this way the Courts can protect against a flood of claims from disappointed bidders relying on minor errors to invalidate contracts for commercial motives.

However, not all claims by commercial competitors will be unmeritorious. The public interest in holding public authorities to law means that where serious errors occur the court will not withhold a remedy.¹⁶²

Finally, further protection for contractors may be provided by section 4(5) of the Judicature Amendment Act. This provides that instead of setting a decision aside the Court may make an order for the decision maker to reconsider and determine the matter. Under subsection 4(5A) the decision continues to have effect until it is amended or revoked by the decision-maker. Pankhurst J used subsection 4(5) in the context of a judicial review claim by a competitor in *Franz Joseph Glacier Guides Ltd v Minister of Conservation*.¹⁶³ As quashing the decision would mean the competitor could not continue to operate until the reconsideration of the decision was completed, Pankhurst J held that it was an appropriate case to use section 4(5).¹⁶⁴

3. Remedies in restitution

¹⁵⁹ Ibid, 47-48.

¹⁶⁰ Ibid, 48.

¹⁶¹ In the context of a merger application: *R v Monopolies and Mergers Commission, ex parte Argyll Group plc* [1986] 1 WLR 763 (CA); in the context of registration of a competitor *Waiheke Shipping Co Ltd v Auckland Regional Council & Seafight Cruises 1990 Ltd* 14/10/91, Wylie J, HC Auckland M 687/91. For Discussion see G M MacMillan “Judicial Review, Competitors and the Court’s Discretion to Withhold a Remedy” (1995) NZLR 192.

¹⁶² *Franz Joseph Glacier Guides Ltd v Minister of Conservation* 13/10/99, Pankhurst J, HC Greymouth CP 14/98.

¹⁶³ Ibid.

¹⁶⁴ Ibid paras 54-55.

The interests of contractors may also be protected by restitutionary remedies. Although it is a matter of debate,¹⁶⁵ the recent developments in the law of restitution in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* have placed contractors faced with a void contract in a better position than previously.¹⁶⁶ In *Westdeutsche* the House of Lords considered whether a bank had any remedy in restitution against a council it had paid money to under a void contract.¹⁶⁷ The contract was void for lack of capacity as it was made for an improper purpose and so ultra vires the power the authority to enter contracts. Prior to *Westdeutsche* recovery in restitution would not have been available. The rules allowing recovery in restitution are general rules only and can be displaced if to award restitution would contravene the policy underlying the rule that makes the contract void.¹⁶⁸ In *Young & Co v Royal Leamington Spa Corporation* the House of Lords had taken this to mean that no recovery in restitution was available when a contract was void for being ultra vires the power of a public authority as the award of a restitutionary remedy would contravene the policy of the ultra vires rule of protecting public funds from unlawful spending.¹⁶⁹ However, in *Westdeutsche* the local authority was not able to rely on the policy of the ultra vires rule as a defence to a claim in restitution by the bank.¹⁷⁰

Academic opinion over the level of the protection offered by *Westdeutsche* for government contractors is divided. Arrowsmith argues that *Westdeutsche* was exceptional as the public policy objections that would normally provide a defence to a claim in restitution did not apply.¹⁷¹

¹⁶⁵ See below

¹⁶⁶ [1996] AC 669.

¹⁶⁷ The *Westdeutsche* case is part of a set of cases concerning interest rate swap transactions that many local authorities entered into in the United Kingdom during the late 1980s. For discussion of the interest rates swap litigation see: Carol Harlow and Richard Rawlings *Law and Administration* (2nd ed) London, (1997) 216-227 for discussion.

¹⁶⁸ *Guinness Mahon & Co Ltd v Kensington v Chelsea Royal BC* [1991] Q.B 215 at 231;

¹⁶⁹ (1883) 8 App Cas 517. The same principle was applied by the Privy Council in *MacKay v City of Toronto* where a municipality's contract was void for failure to comply with municipal law: [1920] AC 208.

¹⁷⁰ In the Court of Appeal decision, which was not disturbed by the House of Lords Legatt LJ was particularly clear: "Protection of council taxpayers from loss is to be distinguished from securing a windfall for them. The disruption of Islington's finances is the result of ill-considered financial dispositions by the council and its officers. It is not the policy of the law to require others to deal at their peril with local authorities": [1994] 4 All ER 890 at 967.

¹⁷¹ Sue Arrowsmith, *The Law of Public and Utilities Procurement* (2005), 48-50.

On the other hand, Andrew Burrows sees *Westdeutsche* as supporting the proposition that the ultra vires doctrine should not afford a statutory body a defence.¹⁷² It is difficult to see why the public policy objections as set out in *Royal Leamington* do not apply. As in *Leamington* the claim in restitution in *Westdeutsche* meant that an ultra vires contract still resulted in dissipation of public funds. Rather, what seems to have happened in *Westdeutsche* is that the Courts have recognised that the public policy argument in *Royal Leamington* is incorrect and that the ultra vires doctrine cannot justify the unjust enrichment of a statutory body. As Burrows points out such an analysis is supported by the fact the House of Lords expressly overruled *Sinclair v Broughman* in *Westdeutsche*.¹⁷³ *Sinclair v Broughman* held that where a private company acted ultra vires of its constitution no claim in restitution was available. The reasoning, as in cases concerning public authorities, relies on holding that allowing a claim in restitution would be tantamount to enforcing a void contract. In *Westdeutsche* the House of Lords held that the reasoning in *Sinclair v Broughman* was persuasive at the time as a claim in restitution was thought to be based on an implied contract. Therefore, to imply a contract to make restitution would be the same as enforcing an express contract to pay. However, the House of Lords held that developments in the law of restitution meant the reasoning was no longer sound. Specifically, the House of Lords rejected the implied contract theory. Accordingly, the overruling of *Sinclair v Broughman* means that the formal basis of the reasoning underlying cases like *Leamington* is undermined. Moreover, as the House of Lords saw overruling the implied contract theory as sufficient to justify holding that the plaintiff in *Sinclair* should have been entitled to restitution the policy argument that public funds ought to be protected equally from ultra vires contracts and resitutionary claims has been impliedly rejected. This is consistent with the point raised by Burrows that the objection to restitution that it amounts to enforcing a void contract is fallacious as the amount paid under restitution will be different to what was paid under the contract.¹⁷⁴

Accordingly, it does appear that an approach more favourable to the interests of contractors is likely to be taken by the courts in light of the decision in

¹⁷² A.S Burrows, *The Law of Restitution* (2002) 569.

¹⁷³ *Westdeutsche*, [1996] AC 669, 710; Burrows, *The Law of Restitution* (2002), 569-570.

¹⁷⁴ Burrows, *The Law of Restitution* (2002), 569

Wesstdeutsche. Therefore, hardship to contractors must be assessed in light of the fact that recovery is likely to be available through restitution.

4. Relief Under the Illegal Contracts Act

A second factor mitigating the potential harshness of the judicial review remedies on contractors is that although the conventional position is that contracts entered into as a result of a reviewable error are void, the position does not seem to have been universally accepted by the New Zealand courts. In *Trustees of the KD Swan Family Trust v UCOL* the Court of Appeal treated an error of law in entering a contract as making the contract subject to the Illegal Contracts Act.¹⁷⁵ Although UCOL entered a lease in breach of a statutory requirement the Court held that this did not void the lease. According to the court the lease merely placed a prior condition on the manner of the exercise of certain powers but did not reduce the ambit of the powers, accordingly no issue of *ultra vires* arose in the case.¹⁷⁶

Having concluded that there was no issue of *ultra vires* the Court characterised the claim as one of a breach of a legal requirement and analysed it in terms of the common law defining illegal contracts and the Illegal Contracts act. This would seem to mean that where procedural requirements set out in a statute are breached but the body is capable of making the decision if the correct procedure is followed the contract may be subject to the Illegal Contracts Act rather than wholly void. If express procedural requirements have this effect it is difficult to see why those implied by the Courts when reviewing for natural justice should not also have this effect. Accordingly, on the reasoning of the Court of Appeal a failure to act in a procedurally fair manner will result in the rights of the parties being determined by the Illegal Contracts Act. However, if a body enters into a contract that it could never legally enter into then the contract will be void for capacity.

However, the initial step in the Court's reasoning, deciding that there was no issue of *ultra vires* is difficult to reconcile with the approach the Courts take to jurisdiction in

¹⁷⁵Unreported, CA 255/02, 23 September 2003.

¹⁷⁶ CA 255/02, 23 September 2003. Para 61

judicial review. In *Peters v Davison* the Court of Appeal summarised the approach of the English and New Zealand Courts since by stating:¹⁷⁷

Judicial review is in general available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers ... Error of law is a ground of review in and of itself; it is not necessary to show that the error was one that caused the tribunal or Court to go beyond its jurisdiction. The effect of the House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 ... is in general to render redundant any distinction between jurisdictional and non-jurisdictional error of law.

It is submitted that it was unnecessary for the Court to draw the distinction it did between procedural errors and *ultra vires* acts. It is possible to accept that all reviewable errors, subject to the discretion over remedies, result in invalidity and to also argue that if a contract is entered into as a result of a reviewable error the Illegal Contracts act can be applied. This requires recognising that the decision to enter the contract and the contract itself are two different things. On an application for review the Court may invalidate the decision to enter the contract. However, whether the attempt to make a contract has any legal effect between the parties would be a separate question to be answered by private law, especially the Illegal Contracts Act.

Although a curious development that is perhaps open to criticism for confusing illegality with capacity, the approach in *KD Swan* is nonetheless available. Moreover, avoiding the conclusion that a contract is void for incapacity is attractive when a council attempts to rely on its own reviewable error to avoid obligations under a contract.¹⁷⁸ If the approach continues to be developed then the wide discretion under section 7 of the Illegal Contracts Act could then provide the Courts with a flexible tool to provide compensation to contractors where their expectations or reliance have been unfairly disappointed by administrative error.¹⁷⁹

¹⁷⁷ [1999] 2 NZLR 164 at 181.

¹⁷⁸ See: S Arrowsmith, "The Impact of Public Law on the Private Law of Contract" in Halson (ed) *Exploring the Boundaries of Contract* (1996) for a detailed argument for the proposition that the effect of a reviewable error on a contract should be to make it illegal rather than void.

¹⁷⁹ Section 7(1) of the Illegal Contracts Act provides that the Court may grant to a party of an illegal contract "such relief by way of restitution, compensation, variation of the contract, validation of the

B Statutory Provisions

3. The Competing positions

The State Owned Enterprises Act 1986, the Crown Entities Act 2004 and the New Zealand Health and Disability Act 2000 (“NZPHD Act”) all have provisions that protect contracts from invalidation through the ultra vires doctrine. Between them these Acts cover a large proportion of the organisations involved in procurement so these statutory provisions will often be engaged in judicial review of contract award processes. The detail of the sections will be discussed later but in outline, section 21 of the State Owned Enterprises Act and section 87 of the NZPHD Act each state that the validity of contracts entered into by the body is not affected by a failure to comply with specified provisions in the Act. Section 20 of the Crown Entities Act sets out that the fact an act is ultra vires does not prevent a person dealing with a statutory entity from enforcing a “natural person act”. “Natural person act” is defined in section 24 to include entering into a contract.

Opinion is divided over whether the sections provide a reason for or against review. In *Lab Tests*, although expressing no final view on the matter, Arnold and Ellen France JJ considered section 87 “does at least indicate that the Courts should take a cautious approach to imposing public law procedural obligations of the sort at issue in this case on DHBs”.¹⁸⁰ The reason for taking a cautious approach was not articulated by the Court. However, there are two possible reasons for taking a cautious approach in the face of such a section. The first is that if the section protects contracts entered into pursuant to reviewable errors then allowing review would be futile as its goal of setting aside the contract would be unattainable. The second possible reason is that as Parliament has set out how reviewable errors are to be dealt with any role for the Courts has been impliedly excluded. This latter approach was favoured by the High Court in *Vector Ltd v Transpower New Zealand Ltd*. Williams J and Dr Maureen Brunt held:¹⁸¹

contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just”.

¹⁸⁰ [2009] 1 NZLR 776 para 90.

¹⁸¹ Unreported 17/8/2000, Williams J and Dr Maureen Brunt, HC Auckland CL 1/98 para 46Para 46..

[A]nother statutory indication against the reviewability of Transpower's pricing decision is the State-Owned Enterprises Act 1986 s 21, earlier cited. If Parliament has thought it fit to provide that failure on the part of an SOE to comply with its statement of corporate intent is not to affect the validity of agreements, rights and obligations into which that SOE enters, that, too, suggests that Parliament intended that failures by SOEs to comply with their statement of corporate intent should be accountable only in terms of the State-Owned Enterprises Act 1986 itself and not through the Courts at the suit of a customer seeking judicial review.

The approach of in *Lab Tests* and *Vector* assumes that the provisions operate to protect contracts from judicial review proceedings. The counter-argument to the approach in *Lab Tests* and *Vector* is based on an interpretation of the provisions that restricts that gives them a narrower ambit. On this view the provisions would only apply in contract proceedings to prevent a statutory body from relying on its own error to escape contractual obligations. This would undermine the cautious approach for review as advocated in *Lab Tests* and *Vector*. G.D.S Taylor argues section 21 requires such a strict interpretation as on its face section 21 is a privative clause.¹⁸² Taylor's argument was accepted by Asher J in *Diagnostic Medlabs* in relation to section 87 of the NZPHD Act.¹⁸³ Indeed, Asher J held that a strict interpretation of section 87 was required by the direction in section 6 of the New Zealand Bill of Rights Act 1990 ("NZBORA") to construe enactments consistently with the rights in the NZBORA including the right judicial review in section 27(2).¹⁸⁴ Accordingly, Asher J held that section 87 did not extend to preventing the invalidation of a contract when a third party successfully judicially reviewed the decision to award it.¹⁸⁵ Rather, the provision only applied to prevent DHBs or other bodies complicit in the error from relying on their own wrongdoing to escape a contract.¹⁸⁶

Accordingly, whether the statutory provisions concerning contracts in the State Owned Enterprises, NZPHD Act and Crown Entities Act provide an argument for or against review depends on the breadth of protection they give to statutory body's contracts. The provisions in the NZPHD and State Owned Enterprises Act will be

¹⁸² G D S Taylor, *Judicial Review: A New Zealand Perspective* (1991) para 1.12.

¹⁸³ [2007] 2 NZLR 832 para 343

¹⁸⁴ *Ibid* para 341

¹⁸⁵ *Ibid* para 345.

¹⁸⁶ *Ibid* para 342.

dealt with in detail first, followed by the more complex provisions of the Crown Entities Act.

1. Section 21 State Owned Enterprises Act and Section 87 NZPHD Act

Section 21 of the State Owned Enterprises Act and Section 87 of the NZPHD Act are very similarly worded. Respectively they provide:

21 Saving of certain transactions

A failure by a State enterprise to comply with any provision contained in Part [1](#) of this Act or in any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, right, or obligation entered into, obtained, or incurred by a State enterprise or any subsidiary of a State enterprise

87 Saving of certain transactions

The validity or enforceability of any deed, agreement, right, or obligation entered into, or incurred by, the Crown or a publicly-owned health and disability organisation is not affected by a failure by the Crown or the organisation to comply with—

[various parts of the Act]

The plain words of the sections support the view that the sections will protect contracts invalidated by judicial review proceedings. There is no express restriction on the application of the provisions depending on whether the validity of a contract is attacked collaterally in defence to an attempt to enforce it or directly through judicial review.

However, Asher J was correct to point out that the Courts construe privative clauses strictly and that section 27(2) of the NZBORA also presumes against privative clauses by guaranteeing a right to judicial review.¹⁸⁷ The approach to interpreting acts consistently with the NZBORA is set out by the Supreme Court in *R v Hansen*.¹⁸⁸ The first step of the analysis is to determine the meaning of the provision in question according to ordinary principles of interpretation and “all relevant

¹⁸⁷ *Bulk Gas Users Group v A-G* [1983] NZLR 129, 133; *O’Reagan v Lousich* [1995] 2 NZLR 620, 627; *Fulcher v Parole Board* (1997) 15 CRNZ 222, 245 (CA).

¹⁸⁸ [2007] 3 NZLR 1, paras 88-94 per Tipping J; at paras 57-60 per Blanchard J; at para 192 per McGrath J; Elias J dissenting paras 15 and 24.

construction principles".¹⁸⁹ If according to these principles the provision does not infringe NZBORA rights then the interpretative provisions of the Bill of Rights are not engaged and that meaning is adopted.¹⁹⁰

Therefore, whether it is correct to read the section down as suggested by Taylor and Asher J requires consideration firstly of how the section should be interpreted according to common law rules of statutory interpretation. If this process results in a narrow reading of the section that does not exclude review then there is no need to have recourse to the NZBORA. The relevant construction principles will include the Courts' strict approach to privative clauses, which predates the NZBORA. The first issue for consideration then is whether section 87 can really be said to be a privative clause in order to justify a strict reading of it. The second is whether there are any objections to a strict reading based on the purpose and context of the provisions.

- (a) Should sections 87 and 21 be treated like privative clauses and construed strictly?

Section 87 and 21 are quite different to standard privative clauses. As Asher J recognised section 87 does not "purport to deny a Court's ability to declare an *ultra vires* act invalid. It focuses rather on the consequences of administrative acts, namely the deeds, agreements, rights or obligations that may follow".¹⁹¹ Accordingly, the argument must be that sections like section 87 and section 21 are *effectively* privative clauses as although they do not strictly speaking exclude review they take away the main reason anyone would want to review. If this is accepted then it must be recognised that the effective exclusion of the judicial review jurisdiction is narrow. The cases where Courts have read down privative clauses have tended to concern clauses that immunise all the decisions of a particular body or person or at least immunise their decisions as to particular matters.¹⁹² Section 87 does not go that far. It in no way prevents a challenge to award a contract before it has been formed and the giving of a declaration or injunction to restrain the formation of the contract. All it does is prevent the Court, once the contract has been formed, from declaring the contract is invalid due to a reviewable error.

¹⁸⁹ Ibid para 89 per Tipping J.

¹⁹⁰ Ibid para 89 per Tipping J.

¹⁹¹ [2007] 2 NZLR 832 para 339.

¹⁹² See, for example, the authorities cited above n 187.

As the exclusion of the judicial review jurisdiction is only partial it is possible to liken section 87 and section 21 to time limit clauses in judicial review. Time limit clauses do not purport to exclude review entirely, only after a certain time period has passed. In contrast to the Court's restrictive approach to full privative clauses the courts have been willing to apply time limit clauses according to their plain words.¹⁹³ The courts' approach to time limits clauses is justified by the need to reconcile the need to ensure public authorities act within the law with the need for certainty in administration.¹⁹⁴ Similarly, sections 21 and 87 may be seen as a decision by Parliament to strike the balance between the interests protected by the ultra vires doctrine and the administrative inconvenience in having concluded contracts for public services set aside.

However, ultimately the analogy to time limit clauses cannot be sustained. Time limit clauses give a clear period of time to all interested parties in which review can be achieved to promote certainty. However, all interested parties are not in the position to know when exactly the contract would be formed. Moreover, the time between awarding the contract and its formation could potentially be very short. The section would then fail to provide a reasonable time to allow review.

Additionally, the administrative inconvenience caused by contracts being invalidated could be dealt with in the discretion over remedies. This would provide a more flexible and direct approach to the issue than reading the sections as applying to all contracts. In practice there may well be little difference in the degree of administrative difficulty created by a successful review once a contract has been awarded but before it has been signed and invalidating the contract once it has been signed. Therefore, it is correct to treat sections 87 and 21 as privative clauses.

(b) Objections to a narrow reading

There are two further objections to a reading of sections 21 and 87 so that they do not stop a court from setting aside a contract. The first is that such a reading leads to an anomaly with respect to innocent contractors. Whereas contractors would be protected from a claim by the DHB that it had failed to act lawfully it would not be

¹⁹³ *Cooper v A-G* [1996] 3 NZLR 480; *Smith v East Elloe Rural District Council* [1956] AC 736; *R v Secretary of State for the Environment; Ex p Ostler* [1976] 3 All ER 90 (CA).

¹⁹⁴ *R v Cornwall CC; Ex p Huntington* [1994] 1 All ER 694 at 700 per Simon Brown LJ. See also the discussion in P. P. Craig, *Administrative Law* (6th ed) (2008), 929.

protected from a similar claim from a third party. However, in both situations, the interest of the contractor is the same and the contractor is just as blameless. Therefore, contractors may rightly feel aggrieved if their contracts were upheld in one case but not the other.

However, the situation where a third party reviews may be distinguished from the situation where a statutory entity tries to escape a contract by the fact that in the former case the third party can claim to have been wronged by the statutory body's error of law. Therefore, it is difficult to see why the interests of the contractor should be protected over those of end users and disappointed bidders. On the other hand the discretion over remedies in judicial review proceedings is capable of taking the interests and innocence or complicity of all the parties into account and balancing them.

The second objection has been set out by Francis Cooke QC.¹⁹⁵ It is that it is artificial to state that provisions such as section 87 and 21 relate only to the law of contract and that the availability of the protection of such provisions should not depend merely on the nature of the proceedings at issue.¹⁹⁶ Cooke argues that Asher J's attempt in *Diagnostic Medlabs* to separate principles of contract law and principles of judicial review is undermined by his decision to rely on *Allerdale*. Cooke argues that given *Allerdale* is a case in contract law it is difficult to see why, if it was being applied to determine whether the contract had any effect, section 87 should not also have been applied.¹⁹⁷

However, treating proceedings in contract law and judicial review differently is justified. In contract proceedings the only interests before the Court are those of the parties. In judicial review proceedings the fact that a third party has identified an interest in the fate of the contract through meeting standing requirements justifies this interest being taken into account through allowing judicial review rather than protecting the contract.

¹⁹⁵ Francis Cooke QC, "*Diagnostic Medlab: was the diagnosis correct?*", (2008) *New Zealand Law Journal* 166, 168.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

Finally, at least in regard to the State Owned Enterprises Act, legislative history suggests a narrow reading of the section as section 21 replaces a privative clause that appeared in the original bill.¹⁹⁸

Accordingly, common law rules of interpretation suggest that sections 87 and 21 should be construed strictly. This obviates the need for any analysis under the NZBORA.¹⁹⁹

2. Protection of contracts under the Crown Entities Act

Section 20 of the Crown Entities Act provides:

20 Some natural person acts protected

(1) Section 19, or any rule of law to similar effect, does not prevent a person dealing with a statutory entity from enforcing a transaction that is a natural person act unless the person dealing with the entity had, or ought reasonably to have had, knowledge—

(a) of an express restriction in an Act that makes the act contrary to, or outside the authority of, the Act; or

(b) that the act is done otherwise than for the purpose of performing the entity's functions.

(2) A person who relies on subsection (1) has the onus of proving that that person did not have, and ought not reasonably to have had, the knowledge referred to in that subsection.

(3) A statutory entity must report, in its annual report, each transaction that the entity has performed in the year to which the report relates that was invalid under section 19 but enforced in reliance on this section.

(4) For the avoidance of doubt, this section does not affect any person's other remedies (for example, remedies in contract) under the general law.

Section 19 provides that acts of statutory entities outside of an Act or that are done otherwise for the purpose of performing its functions are invalid. Section 23(1) provides that a statutory entity may not assert against a person dealing with the entity that a person held out by the entity as having authority to act on its behalf did not have that authority. The subsection applies unless the person dealing with the entity reasonably ought to have known about the lack of authority.

¹⁹⁸ Michael Taggart, *State Owned Enterprises and Social Responsibility: A contradiction in terms?*, N.Z. Recent L. Rev 343, 353.

¹⁹⁹ If the NZBORA were applied it is likely the same result would follow as a strict interpretation would be more consistent with the right to judicial review in section 27(2) and so would have to be preferred by the Court under s.6 of the NZBORA.

Section 20 is similar to the sections governing contracts in section 87 of the NZPHD Act and section 21 of the State Owned Enterprises Act. However, instead of stating that the contract is valid it gives a “person dealing” with Crown entities the right to enforce contracts against the Crown entity. “Person dealing” is defined in section 24 as the other party to a transaction with a statutory entity. Section 23 provides specific protection for delegation errors. However, like the State Owned Enterprises and NZPHD Act provisions the provisions in the Crown Entities Act do not indicate whether contracts with statutory entities are protected in all proceedings or just in contract proceedings.

Nonetheless all the arguments set out above for construing the State Owned Enterprises Act and NZPHD Act provisions strictly apply to the Crown Entities Act provisions.

Indeed, the wording of the Crown Entities Act provisions lend itself more easily to an interpretation that the section is only designed to operate in contract proceedings. Section 19 is phrased in terms of enforcing the contract, which would occur in private law proceedings. Section 23(1) only expressly states that the Crown Entity may not assert that its employees did not have authority to enter a transaction. No restriction is placed on third parties asserting a lack of authority. Moreover, section 21(d) expressly states that section 20 does not limit the availability of judicial review. Similarly section 23(3) provides that nothing in the section affect’s any person’s right to apply for judicial review.

Accordingly, neither the provisions of the Crown Entities Act nor the provisions of the NZPHD or State Owned Enterprise Act provide any impediment to review.

CONCLUSION

A number of academics have suggested that the solution to ensuring that government is held to public law values in its procurement processes lies not in public law but in the incorporation of public law principles into private law.²⁰⁰

Whether this will be the case is a somewhat speculative, empirical question. However, experience over the last ten years, in the field of procurement at least, points against the chances of such development occurring.²⁰¹ In the mid-90s Janet McLean wrote an article that included discussion on the potential of the then newly-developed legal mechanism of the process contract to incorporate public law values.²⁰² We know now that under *Pratt* the scope of process contracts expressly excludes public law values. Moreover, in *Lab Tests*, *Pratt* was used to restrict the ambit of public law. McLean also predicted, along with Michael Taggart that the common law doctrine of common callings may be revived in response to ensure fairness in the pricing decisions of corporatized utility providers.²⁰³ However, the argument was ultimately unsuccessful in the Court of Appeal.²⁰⁴ In their more recent work both Taggart and McLean doubt whether private law is as capable of absorbing public law values as they once thought.²⁰⁵

²⁰⁰ For instance Freedland argues: Freedland, M “Government by Contract Re-examined – Some Functional Issues” in P Craig and R Rawlings (eds) (2003), 123; McLean, “Contracting in the corporatized and privatized environment” (1996) 7 Public Law Review 223. D, Mullan, “Administrative Law at the Margins” in Michael Taggart (ed) *The Province of Administrative Law* (1997), 134.

²⁰¹ Although, signs are more hopeful in the case of contracts between government agencies. In *The Power Co Ltd v Gore District Council* the Thomas J noted obiter that “conventional frustration principles will not necessarily be applicable or fully applicable to long term supply contracts between government agencies” : [1997] 1 NZLR 537, 555-556.

²⁰² McLean, “Contracting in the corporatized and privatized environment” (1996) 7 Public Law Review 223.

²⁰³ McLean, *ibid*; M. Taggart “The Province of Administrative Law Determined?” in Taggart (ed) *The Province of Administrative Law* 1997.

²⁰⁴ *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646.

²⁰⁵ J McLean, “The Ordinary Law of Tort and Contract and the New Public Management” 30*CLWR* 387; M Taggart “The Peculiarities of the English’: Resisting the Public/Private Law Distinction in P Craig and R Rawlings (eds) *Law and Administration in Europe Essays in Honour of Carol Harlow* (2003). 107 Freedland admits to have recently changed camps the other way: Government by Contract Re-examined – Some Functional Issues” in P Craig and R Rawlings (eds) (2003), 123, 132-133. However, his prediction made in 2003 is undermined by the experience over the last ten years Taggart and McLean point to.

Accordingly, it seems public law is stuck with developing a principled approach to the review of government contracting decisions. However, this should not be a cause for concern. Although necessarily general, a comparison between the potential of public law and private law to deal with the issues posed by government contracting tends to highlight the strengths of public law. Firstly, such a comparison demonstrates the flexibility of judicial review. This is most evident at the remedies stage. Whereas remedies in contract and tort issue as of right, as has been seen, remedies in public law are discretionary. Accordingly, there is more room for balancing the interest in vindication of individual legal rights and the overall interests of administration. At least in comparison to contract,²⁰⁶ public law also evidences more flexibility in its substantive principles. Its principles can be applied with varying intensity to avoid undue interference with commerce while still protecting the public interest in government decision makers acting rationally and fairly.

Secondly, public law remedies provide a better vehicle for the expression of public law values than private law remedies. For example, Arrowsmith has suggested that the interests of bidders in a fair tendering process ought to be protected by a development of promissory estoppel.²⁰⁷ As an equitable doctrine such a development would have a flexibility that developments in tort or contract could not. However, the interests in public procurement extend beyond the parties to the tendering process to the ultimate consumers of a public service. Accordingly, a public law remedy, which protects both the disappointed bidder and the wider public interest and so is more appropriate. The public interest is protected by having the decision remade according to proper procedures in order to ensure an accurate result. This requirement to remake the decision also actually reflects the interests of the bidder in a far more direct way than monetary remedies do. Monetary remedies would be on a loss of a chance basis. Rather than going through the torturous process of calculating the probability of an award as would have to occur in private law the public law remedy is simpler – it just gives the disappointed bidder another chance.

²⁰⁶ Negligence, like review does have a very contextual focus.

²⁰⁷ S Arrowsmith, "Protecting the Role of Bidders for Public Contracts; The Role of The Common Law" (1994) 53(1) *Cambridge Law Journal* 104.

What is a cause for concern is the failure of the courts to recognise the potential of public law to operate in a context sensitive way. The Courts have justified their refusal to review government tendering processes firstly by characterising tender processes as a commercial activity. On this approach government bodies involved in tender processes should be treated like private sector contractors because they are behaving like private sector contractors. However, the government's constant duty to act in the public interest will always distinguish it from private sector contractors. The use of government contracts to achieve policy goals and the distance of government contracting markets from the paradigm of a commercial market further undermine the private sector analogy. To do so ignores the normative and practical consequences of the fact a function is performed by government, regardless of what that function is. It also applies the functional test to a context it was not designed for.

The adoption of an institutional test would also allow the substantive principles of judicial review may to be applied with a level of intensity commensurate with the commercial and public objectives of the government body. This is preferable to the current approach, which forces the complex mix of public and private interests in government contracting to be squeezed into one half of a binary category.

Recognition of the deficiencies in the Courts' characterisation of government contracting as a commercial activity also undermines the Courts' approach to corporatisation legislation. Like the activity of government contracting, the legislation governing many of the bodies who carry it out has both public and private aspects. In accordance with the Courts' protection of the right to judicial review at common law and under the NZBORA, legislation should affect the intensity with which particular grounds of review are applied. It should not exclude review altogether in favour of ineffective accountability mechanisms.

Allowing more applications at the reviewability stage would inevitably result in the courts having to pay more attention to the consequences of finding a reviewable error. However, these consequences should not hold the Courts back at the reviewability stage. A close analysis of legislation that provides for the consequences of a finding of reviewable error reveals that it provides no impediment to judicial review. The discretion the Court has over remedies provides a far more nuanced way to consider the balance of the interest in holding the executive to law and the

consequences on third parties and the wider public. The courts should not abdicate this function by excluding applications for review of government contracts at the reviewability stage. Even if a contract is set aside developments in restitution and the Courts' interpretation of the Illegal Contracts Act provide opportunities for the interests of contractors to be protected.

It has been said in relation to the discretion over remedies that judicial review is better used as a "precision instrument rather than a juggernaut".²⁰⁸ In the case of government tendering processes this comment is just as true at the reviewability stage of the inquiry as it is at the remedies stage. It would be a bold step for New Zealand to adopt the approach of a single English High Court judge to determine the reviewability of government tender processes. However, the adoption and development of the institutional approach set out by Elias J in *Molinero* would allow government tendering processes to be treated with a precision that merits their complexity and their importance.

²⁰⁸ T. Bingham, "Should Public Law Remedies be Discretionary" (1991) *PL* 64, 75.

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