GOVERNMENT OWNED CORPORATIONS: PUBLIC OWNERSHIP, ACCOUNTABILITY AND THE COURTS

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Introduction

The hybrid nature of government owned corporations (GOCs), combining public ownership with a 'private' structure, further compounds the already significant conceptual difficulties in distinguishing between 'public' and 'private' matters.[1] Accordingly their nature requires many of the traditional assumptions of public law to be confronted, and poses difficulties in the determination of a proper level of accountability for GOCs, both politically and legally through the imposition of legal remedies by the courts.[2] A common view is that as GOCs are publicly owned, they must act in the public interest, and thus should be subject to the same legal constraints, particularly administrative law remedies, as the rest of government. The alternative argument is that GOCs acting in a 'private' capacity should only be subject to 'private law' remedies. However such bodies do not readily lend themselves to simplistic analysis. More is required than simply asking whether a GOC is publicly owned in determining the appropriate extent of its legal obligations and constraints.

The object of this article is to examine the 'public ownership' of GOCs as the basis for accountability, legal duties and obligations, and amenability to judicial review.[3] The main focus of this examination is the role of the courts in securing public accountability for the conduct of GOCs, particularly in their commercial activities, consistently with the statutory objectives of corporatisation. It is apparent that many of the assumptions regarding public ownership and the activities of GOCs require some reappraisal, if these vexing issues are to achieve some level of resolution.

Corporatisation and its Objectives

In this discussion, the term 'GOC' refers to corporations owned by government which have been established or restructured to have a private sector or equivalent corporate structure, and which carry on business in the pursuit of commercial objectives. Corporatisation is the process which restructures or transfers existing government business enterprises, and changes the conditions under which they operate, 'so that they are placed, as far as practicable, on a commercial basis and in a competitive environment.'[4] In this narrow

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1 On the public/private distinction, see H Woolf, 'Public Law-Private Law: Why the Divide? A Personal View' (1986) *Public Law Review* 220; C Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 *Federal Law Review* 185; G Airo-Farulla, ''Public' and 'Private' in Administrative Law' (1992) 3 *Public Law Review* 186.

2 See for example, S Bottomley, 'Regulating Government-Owned Corporations: A Review of the Issues' (1994) 53 *Australian Journal of Public Administration* 521; M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44; M Taggart, 'State Owned Enterprises and Social Responsibility: A Contradiction in Terms?' (1993) *NZRLR*.

3 The application of other elements of the 'administrative law package', namely freedom of information, administrative appeals, and Ombudsman review, are beyond the scope of this paper, which only examines remedies imposed by the courts.

4 *Government Owned Corporations Act* 1993 (Qld) s. 16; Queensland Treasury, *Corporatisation in Queensland: Policy Guidelines* (1992), p 5. This is distinct from 'commercialisation', which does not alter the structure of the enterprise.

sense,[5] corporatisation has occurred since the mid 1980s in New Zealand and some Australian jurisdictions under generic 'umbrella' legislation, which provides mechanisms for establishment of GOCs and governs their conduct.[6] In contrast, the Commonwealth has used an *ad hoc* approach of incorporation under the Corporations Law using its executive powers, or converting existing statutory bodies to that status under specific legislation.[7]

The end result of corporatisation is a company incorporated under the Corporations Law (company GOC), or a corporation incorporated under specific legislation which possesses many of the same characteristics (statutory GOC).[8] The statutory GOC is thus provided with a share capital, board of directors and memorandum and articles of association to mirror the private corporation, but continues to be established under statute. Any government enterprise which produces goods or services that are either sold or capable of being sold in the market place may be a candidate for corporatisation.[9] Thus providers of 'essential' services such as electricity, gas, water and telecommunications, as well as such diverse entities as financial institutions, prisons, port authorities and gambling operators, have been corporatised.

It should be stressed that GOCs governed by GOC legislation are just one particular form of government business enterprise.[10] In addition the process of corporatisation is one of structural reform of existing business enterprises. Accordingly it does not of itself expand the business activities of government, but gives them a more overtly commercial basis. The public ownership of business enterprises is far from new in Australia, which has a long and successful history of public enterprise dating back to the nineteenth century. Such enterprises needed to be established by government in Australia's developing economy, as private capital, labour and resources were insufficient to ensure the delivery of essential services and infrastructure over large areas with a scattered population.[11] Generally speaking, the assumption behind corporatisation is that the GOC remains in public ownership, and it is not merely a step to privatisation.[12] For various political or social reasons, Australia has not privatised its government enterprises to the same extent as other countries such as the United Kingdom and New Zealand,[13] so that there are now a large number of GOCs which constitute a significant proportion of economic activity in Australia.[14]

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5 Corporatisation in a broad sense, namely the use of corporate entities to conduct government business enterprises, began in the nineteenth century: see R Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective' (1995) 6 *Public Law Review* 7.

6 *Government Owned Corporations* Act *1993* (Qld); *State Owned Enterprises Act 1986* (NZ); *State Owned Enterprises Act 1992* (Vic); *State Owned Corporations Act 1989* (NSW). In this Paper reference will be made to the Queensland Act ('GOC Act (Qld)').

7 e.g. *Commonwealth Banks Restructuring Act 1990* (Cth).

8 e.g. the Queensland Investment Corporation is a statutory GOC constituted under the *Queensland Investment Corporation Act 1991* (Qld). In contrast the New Zealand Act only has company GOCs.

9 Corporatised enterprises may have been part of a government department, a statutory authority (incorporated or unincorporated), a government company, or even a statutory GOC (in the case of a company GOC).

10 This article discusses this type of GOC. The conclusions are not necessarily applicable to all GBEs, but will apply to Commonwealth 'GBEs' which are subject to a regime similar to GOC legislation.

11 See R Wettenhall, 'Australia's Daring Experiment with Public Enterprise' in A Kouzmin and N Scott (eds), *Dynamics in Public Sector Management* (1990); R Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective' (1995) 6 *Public Law Review* 7.

12 GOC Act (Qld), s. 16(b). However in some cases it may be appropriate to use the GOC structure as a form suitable for sale, as some form of share capital is required to transfer ownership to private owners, e.g. *TAB Privatisation Act 1997* (NSW).

13 K Wiltshire, 'Corporatisation and Privatisation' in N Scott (ed), *Government and Business Relations in Australia* (1994).

14 In 1994, GOCs contributed directly to 10% of Gross State Product and 6% of capital expenditure in Queensland: E Morton, 'Corporatisation in Queensland: Two Years On' (1995) 4 *Queensland Economic*

The principal objective of corporatisation is to improve both the efficiency and accountability of GOCs.[15] The increased resources flowing to government from improved efficiency is intended to enhance the government's economic performance and can be used to satisfy the social objectives of the government.[16] The objectives of corporatisation are to be achieved through the 'key principles' of clarity of commercial and non-commercial objectives, management autonomy and authority, strict accountability for performance, and competitive neutrality through being subject to the same rules as any other business.[17] GOCs are organised in a form designed to assist in the implementation of these principles and remove as far as possible the disadvantages of government ownership. It should be noted that although the principal objective of a GOC is to be commercially successful,[18] corporatisation is also intended to improve the accountability of GOCs, to its shareholding Ministers and to the public.[19]

Community service obligations (CSOs) are a key element of the corporatisation process. These are obligations which are not in the commercial interests of the GOC to perform, which the government directs it to perform.[20] Instead of GOCs being used as a covert instrument of social policy by the government, any obligations which the government wishes them to perform must be clearly identified, costed and reimbursed, and separated from their purely commercial functions, so that their commercial performance is not impeded. It is in relation to the objective of competitive neutrality, when it is sought to remove the 'disadvantages' of public ownership, that a fundamental clash of values occurs. Many of these 'disadvantages' have been imposed on statutory corporations as measures of political or legal accountability. Administrative law is an example. The extent to which these disadvantages may apply to GOCs without compromising their ability to effectively engage in commercial activity is the central focus of the issues discussed in this article.

Government-owned Corporations and Accountability

The demand for accountability reflects the requirement that the government is responsible and answerable for its conduct, ultimately to the people which it represents. Although it is doubtful that a GOC is part of the executive in a constitutional sense,[21] the citizens of the State are the ultimate owners of a GOC, as the shares must be held by Ministers on behalf of the State.[22] Accordingly the government needs to be accountable to the public for the conduct and performance of GOCs.[23] The public do not have the same level of direct accountability as that employed by a private sector shareholder, such as the ability to vote at

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Forecasts and Business Review 73, 73. Commonwealth GBEs contribute 25% of business and 10% of GDP: S Bottomley, 'Corporatisation and Accountability: The Case of Commonwealth Government Companies (1997) 7 *ACLJ* 156.

15 GOC Act (Qld) s. 17.

16 Queensland Treasury, *Corporatisation in Queensland: Policy Guidelines* (1992) at 5.

17 GOC Act (Qld) s. 19. See M Taggart, 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77.

18 GOC Act (Qld) s. 20. However some GOC legislation also requires GOCs to exhibit 'social responsibility'. These different provisions are discussed below.

19 The accountability regime for GOCs is discussed below.

20 GOC Act (Qld) s. 121(1).

21 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 24 per Finn J; L Zines, *The High Court and the Constitution*, 4th ed (1997), 268*; Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

22 GOC Act (Qld), ss. 73, 79 and 82, 83.

23 As to the requirements of responsible government for GOCs which may be implied in the Constitution, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

company meetings, and appoint directors. In this regard the fact of public ownership of a GOC justifies a greater level of accountability than an equivalent private sector corporation.

The standard regime of accountability imposed by GOC legislation is quite detailed and comprehensive,[24] and should be described to provide the context for the examination of the role of the courts. To briefly summarise, it involves the following features:

- Accountability of management to an independent board of directors for the performance of its commercial functions and CSOs.
- Accountability of the board to the shareholding Ministers who appoint the board.
- Responsibility of the shareholding Ministers, who hold shares on behalf of the State, to Parliament for that performance.
- Preparation and approval by the shareholding Ministers of a statement of corporate intent, which sets out financial and non-financial performance targets, and community service obligations.
- Preparation and approval by the shareholding Ministers of a corporate plan.
- Audit by the Auditor-General and other public reporting obligations.
- Preparation of quarterly and annual reports, which must be laid before Parliament.
- General monitoring of performance by government.
- Answerability to parliamentary committees.[25]

The reliance on Ministerial responsibility is contentious in light of its perceived inadequacy as an accountability mechanism, particularly with the present proliferation of independent government business enterprises.[26] The autonomy provided to GOC management does reduce accountability to some extent, but that is the purpose of corporatisation. The reform process would be ineffective without that autonomy. Be that as it may, it is beyond the scope of this article to consider the adequacy of these mechanisms. However in the areas in which the government retains control, the GOC regime imposes significant accountability obligations upon GOCs in a systematic and transparent manner.

The Nature of Public Ownership

Public ownership and legal duties

The 'public trust' model of accountability requires, in addition to Ministerial responsibility, numerous measures of accountability to the public and appropriate agencies, including

24 See GOC Act (Qld) Chapter 3 Parts 3, 5, 6, 7, 8 and 11. For a more comprehensive description of the New Zealand regime, see M Palmer, 'The State-Owned Enterprises Act 1986: Accountability?' (1988) 18 *VUWLR* 169.

25 The Commonwealth has no GOC legislation, but many of these measures do apply to Commonwealth GBEs under various legislative and administrative arrangements: See S Bottomley, 'Corporatisation and Accountability: the Case of Commonwealth Government Companies' (1997) 7 *ACLJ* 156.

26 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995), 78.

scrutiny by the courts.[27] This model, suggested in the WA Inc Royal Commission Report, reflects the public trust theory developed by Finn, that because sovereign power rests with the people,[28] and the people have conferred that power upon government, the government is the trustee of the public. Government is therefore required to act for the benefit of the public, and is accountable to the public for the exercise of that trust.[29] This also applies to GOCs, which because of their public ownership, cannot be equated with a private corporation:

> Howsoever much governments may wish GBEs to conduct their affairs commercially and in the fashion of the private sector, they remain public trustees. The illusion of the corporate form cannot be allowed to conceal the true identity of their ultimate owners - the public.[30]

Following his appointment to the Federal Court, Finn J has also recently suggested in his judgment in *Hughes Aircraft Systems International v Airservices Australia*[31] that this may be the basis for the imposition of contractual duties of fair dealing upon public bodies, derived from policies in the law such as ensuring that the powers possessed by a public body, whether conferred by statute or contract, are exercised 'for the public good', and requiring such bodies to act as 'moral exemplars'.[32] Finn J extended these arguments to what he terms 'the fourth arm of government', namely statutory authorities and GOCs, 'whose owners are, ultimately, the Australian community' whom they are established to serve.[33] A public authority, including a GOC, is required to act in the public interest, because it has no legitimate private interest.

The public trust concept has merit as a basis for an enhanced level of political and statutory accountability for bodies within the domain of the public sector to the public as their owners.[34] However there are problems with the fact of public ownership of itself being the basis for the imposition of higher legal obligations upon GOCs in its commercial dealings than upon similar private entities.

In an environment where 'public' functions are increasingly carried out by entities with both private and mixed ownership, it is artificial to base such general law duties upon ownership alone. For example, are there any relevant differences between Telstra and Optus, or for that matter between Optus and a fully privatised Telstra,[35] sufficient to require one of them to act for the public good? The two corporations are largely the same except for the identity of their major shareholder. Such a duty would also seemingly apply to a GOC, but not after it is privatised. In the case of a corporation which is only partially owned by the government, it

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27 *Report of the Royal Commission into the Commercial Activities of Government and Other Matters*, (1992) (WA Inc Royal Commission Report). See J Uhr, 'Redesigning Accountability: From Muddles to Maps' (1993) 65 *AQ* 1; S Bottomley, 'Regulating Government-Owned Corporations: A Review of the Issues' (1994) 53 *AJPA* 521.

28 *Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106, 136 per Mason CJ.

29 P Finn, 'A Sovereign People, A Public Trust' in P Finn (ed), *Essays on Law and Government (Volume 1: Principles and Values)* (1995); P Finn, 'Public Trust and Public Accountability' (1993) 65 AQ 52; P Finn, 'The Abuse of Public Power in Australia: Making our Governors our Servants' (1994) 5 *Public Law Review* 43.

30 P Finn, 'The Abuse of Public Power in Australia: Making our Governors our Servants' (1994) 5 *Public Law Review* 43 at 54.

31 (1997) 146 ALR 1.

32 Ibid, 41-2.

33 Ibid, 40.

34 See *report of the Royal Commission into the Commercial Activities of Government and Other Matters* (1992) (WA Inc Royal Commission Report).

35 For example, Telstra Ltd is a publicly listed corporation, 66% of the shares in which is owned by the Commonwealth.

is not correct to say that the corporation has no interest other than the public interest; there are the significant interests of the private shareholders and creditors to consider, as required by the Corporations Law.

The concept of a public trust surely also includes the proper stewardship of public resources held by government. This is a major reason for imposing strict accountability obligations upon GOCs, to ensure that they are properly accountable to their ultimate shareholders, the public. Certainly any inefficiency and mismanagement of GOCs is a matter of legitimate public interest.[36] Given the significance of GOCs to the economy as a whole, the performance of GOCs may have major ramifications for the health of public finances, and a flow-on effect to other industries. It might therefore be arguable that there is an equal obligation for governments to use public resources and to conduct service delivery as efficiently as possible, and that the public good is served in this way. This is the clear intention of GOC legislation.[37] To subject a GOC to obligations additional to its competitors may impair the ability of the GOC to effectively compete, and thus frustrate the achievement of that objective.

In *Hughes Aircraft Systems*, the public interest which the authority was required to serve was readily determined from the express or implied statutory mandate in its empowering legislation.[38] However in the case of a GOC conducting commercial activity it may be more difficult to identify such a 'public interest' without clear statutory criteria. Unless it has specific CSOs or statutory obligations, the only public interest which a GOC might be required to serve is to conduct its business efficiently and to be commercially successful and maximise its benefit to the economy.[39] Arguably where the only reason for the retention of public ownership is an aversion to selling a profitable public business, the GOC's only public obligation is to act efficiently and earn a satisfactory return, because it is not intended to serve any social objective. Some GOC legislation requires a GOC to act with 'social responsibility' where it is possible to do so consistently with its commercial objectives, but that is unlikely to be sufficiently strong to imply legal duties.[40] Further, a general expectation of 'a standard of fair play' from government[41] does not necessarily translate into legal obligations in commercial dealings.

The argument seems to confuse the focus of accountability. The fact that a GOC is owned by the public is relevant to the broader issue of accountability to the public as its owners, but is a separate issue from the question of its legal obligations in a particular transaction. In seeking to impose duties upon a GOC in its dealings with another party, the relevant issue would seem to be the nature of the power, if any, exercised by the GOC in that situation rather than the nature of the ownership of the GOC.

Public ownership and judicial review

Similar arguments have also been raised in relation to the controversial issue of whether GOCs should be amenable to judicial review in the conduct of their activities. The role of

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36 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 31 per Mason CJ (Dawson and McHugh JJ agreeing); *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168 per Lord Wilberforce, 1185 per Lord Salmon.

37 GOC Act (Qld) s. 17.

38 (1997) 146 ALR 1, 40.

39 In the Victorian legislation, the public benefit which a SOE must serve is based on its efficiency and contribution to the economy: *State Owned Enterprises Act 1992* (Vic), s. 18.

40 e.g. *State Owned Corporations Act 1989* (NSW), s. 8(c); *State Owned Enterprises Act 1986* (NZ) s. 4(C). See *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1993] 1 *NZLR* 551, 558. This conclusion was not disturbed on appeal by the Privy Council in *Mercury Energy v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521.

41 *Melbourne Steamship Co v Moorehead* (1912) 15 CLR 333, 342 per Griffith CJ.

administrative law is to ensure that government acts within its lawful powers, to provide a mechanism for achieving justice in individual cases, to improve the quality of administration, and to contribute to the accountability mechanisms for government decision making.[42] The goal of keeping 'the powers of government within their legal bounds, so as to protect the citizen against their abuse'[43] is particularly applicable to judicial review. That role of the courts has grown in tandem with the growth of the state, and with a growing realisation of the inadequacy of Ministerial responsibility. The potential range of decisions subject to judicial review is now large in scope, extending to any exercise of government or statutory power which affects the rights, interests and legitimate expectations of persons.[44] It is therefore seen as natural that this should extend to GOCs, even though judicial review has not traditionally applied to 'commercial' decisions of government enterprises.

The argument most often advanced is that as GOCs are required to act in the public interest and therefore can never be considered to be performing 'private' functions, they must be subject to judicial review.[45] The reason why this should apply to GOCs and not private corporations is that the former are publicly owned, and 'although both types of bodies take decisions in the interests of their shareholders', the shareholders of GOCs are 'ultimately the public.'[46] A further argument is that judicial review is necessary to safeguard the interests of the consumer in dealing with the GOC.[47] This is exemplified by the reasoning of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*:

> A state enterprise is a public body; its shares are held by Ministers who are responsible to the House of Representatives and accountable to the electorate. The defendant carries on business in the interests of the public. Decisions made in the public interest by the defendant, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the defendant are amenable in principle to judicial review both under the Act of 1972 as amended and under the common law.[48]

The conceptual problems with arguments based on public ownership referred to above also apply in the context of judicial review. Further, the facts that a GOC is publicly owned and that its decisions may affect individual rights are not necessarily linked. The effect on the individual is not caused by the public ownership but by the nature of the transaction with the GOC. It is not open to doubt that the fact of public ownership means that a GOC is required to act in the interests of the public as its *owners*. However in the context of GOCs, judicial review would protect primarily the interests of citizens as individual *consumers*.[49] If the

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42 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995) at paras 3.9-3.13.

43 H Wade and C Forsyth, *Administrative Law*, 7th Ed (1994), p 4.

44 *Kioa v West* (1985) 159 CLR 550; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *Annetts v McCann* (1990) 170 CLR 596.

45 The strongest advocate of this view is Professor Michael Taggart: M Taggart, 'State Owned Enterprises and Social Responsibility: A Contradiction in Terms?' (1993) *NZRLR* 343; M Taggart, 'The Impact of Corporatisation and Privatisation on Administrative Law (1992) 51 *AJPA* 368; M Taggart, 'Corporatisation, Contracting and the Courts' [1994] *Public Law* 351. Also see N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198; M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44.

46 N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198 at 201.

47 N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198, 201; M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44, 68.

48 [1994] 1 WLR 521, 526.

49 The categorisation of citizens as 'consumers' has been criticised, but the term is only used here to indicate the different aspects of accountability: see V Nagarajan, 'Reform of Public Utilities: What About the

interests of the citizen as consumer are the basis for judicial review, then logically it should apply to any corporation in similar circumstances. The mere fact that government owns a GOC is therefore a dubious basis for making its decisions amenable to judicial review.

Functions and powers exercised by GOCs

Legal duties derived from the 'public trust', and amenability to judicial review, should not automatically extend to all activities of GOCs in all transactions without a critical examination of the nature of GOCs, the diverse roles which they perform, and the objectives of corporatisation. This is particularly so in view of the clear intention of parliaments in GOC legislation to implement principles of competitive neutrality, and to provide a detailed and specific accountability regime. These issues cannot be resolved at a superficial level by stating that 'public ownership' *per se* requires certain measures in all cases, or by simply characterising its decisions as 'public' or 'private'. The type of power or function which a GOC exercises in the particular transaction in which it is sought to impose legal obligations upon the GOC must be considered if those obligations are to have a coherent and rational basis.

The type of power is relevant because it focuses on the relationship between the GOC and the other party to the transaction, and because the role of administrative law is to control the exercise of executive 'power' and protect persons whose rights and interests may be affected by that power.[50] The classification should look at the nature of the power, and the control which it exerts over the other party, as well as its source.[51] *Government* power therefore represents power that only the government (or a statutory delegate) can exercise in a particular transaction or dealing, because it emanates from a legislative or executive source. This includes powers conferred by legislation, but may also be the exercise of prerogative powers by the executive. Clearly a body clothed with powers directly derived from statute exercises such power. Further, where legislation directs a GOC to perform certain obligations, its source of authority for the action is legislative, even if that obligation may be carried out through contract.[52] Commercial transactions could therefore in some circumstances be the exercise of government power. However if a GOC enters contracts in the performance of its commercial functions under powers generally derived from the Corporations Law or from the statute which establishes it, it is not using government power in its dealings with others. The power is one that could be exercised by any legal person, and is derived from the general law.

However even without exercising government power in its commercial dealings, a GOC may still be exercising *market* power, which results from lack of effective competition or its strong bargaining position, which gives the customer no real choice but to use the GOC to obtain a service.[53] This power is often taken to be government power, as government enterprises usually possess it, in industries which have been structured to supply goods or services through a government monopoly provider. The fact that it is usually possessed by a government enterprise leads to the assumption that judicial review should be used to overcome it, when this type of power is really the domain of the *Trade Practices Act 1974* (Cth) and other general law remedies. The GOC is not exercising a power of government in this sense, as it is a power that could be possessed by a public or private body or person in

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Consumer?' (1994) 2 *CCLJ* 155; R Clare, 'Changing Citizens into Customers' (1995) 9 *Directions in Government* 19.

50 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 388; H Wade and C Forsyth, *Administrative Law*, 7th Ed (1994), p 4.

51 *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815.

52 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129; *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181.

53 In this article, the term 'market power' as any 'non-government' power is a broader concept than that defined in Part IV of the *Trade Practices Act 1974* (Cth), although it includes that concept.

a similar position. The difference between government and market power lies at the heart of the debate over the applicability of judicial review to GOCs.

The functions being performed by a GOC are also relevant. Although commercial functions are not within the traditional scope of judicial review, an apparently commercial or contractual decision can be used to implement policy or government objectives. It is therefore said that judicial review should apply to the commercial activities of public bodies, as there is no such thing as a purely commercial government decision.[54] However it is an essential element of corporatisation that any non-commercial objectives be separated from commercial ones and identified as CSOs, and that responsibility for regulatory decisions be removed from any GOC conducting commercial activities.[55] Accordingly, in the case of GOCs, it is possible to separate and identify such functions, and for a decision to be purely commercial.

A 'functional' categorisation of public corporations suggested by Friedmann, and adopted by Bottomley, as a method for determining appropriate regulatory measures for GOCs, may also be used to categorise the functions which the GOC is performing in a particular situation.[56] On that basis the different types of functions are *commercial*, that is, engaging in an enterprise run according to economic and commercial principles; *social service*, that is, the provision of social services on behalf of the government; or *regulatory*, that is, an administrative, supervisory or regulatory function.[57] All functions performed by GOCs can be placed in one of these categories, although it is now unlikely that a GOC will be exercising regulatory functions. The GOC will often have 'social service' functions which reflect the reason for retaining it in government ownership,[58] and these may be defined as CSOs. Where there is no such identifiable reason, the GOC is likely only to be performing commercial functions.

In the remainder of this article, these concepts will be applied to examine the circumstances in which judicial review and general law remedies may apply to GOCs.

Government-owned Corporations and Judicial Review

Judicial review may be available in relation to the conduct of GOCs under the common law, or under statutory grounds for judicial review in some jurisdictions.[59] However the common law prerogative writs are still available in a modified form in those jurisdictions,[60] although for the Commonwealth the requirement that the decision is made by 'an officer of the Commonwealth' may be difficult to satisfy in the case of a GOC.[61] In other jurisdictions the common law remedies are the only available means of judicial review. Some decisions of GOCs are expressly exempted from judicial review in some statutory jurisdictions. For

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54 See A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363.

55 GOC Act (Qld), s. 19(a).

56 W Friedmann, 'The Legal Status and Organization of the Public Corporation' (1951) 16 *Law and Contemporary Problems* 576, 579-80; S Bottomley, 'Regulating Government-owned Corporations: A Review of the Issues' (1994) 53 *AJPA* 521 at 530.

57 Friedmann used the term 'supervisory' for the third category, but 'regulatory' is preferred as it is more consistent with contemporary terminology.

58 Such as to deal with a natural monopoly, supporting economic development, filling a perceived 'gap' in the market, or achieving a more socially desirable outcome: Queensland Treasury, *Corporatisation in Queensland: Policy Guidelines* (1992), p 6.

59 *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Judicial Review Act 1991* (Qld); *Administrative Law Act 1978* (Vic); *Administrative Decisions (Judicial Review) Act 1989* (ACT).

60 e.g *Judicial Review Act 1991* (Qld), Part 5; *Judiciary Act 1903* (Cth), s. 39B.

61 *Judiciary Act 1903* (Cth), s. 39B; Constitution s. 75(v).

example, in Queensland, the decisions of certain GOCs made in carrying on commercial activities or in the delivery of CSOs are exempt from judicial review.[62]

Judicial review has been sought as a remedy for the decisions of statutory authorities and GOCs to enter (or refuse to enter) and terminate contracts in Australia, as 'decisions of an administrative character made under an enactment' under the *Administrative Decisions (Judicial Review)* Act *1977* (Cth),[63] and in New Zealand as the exercise of statutory power' under the *Judicature Act 1972* (NZ). Both statutes essentially require the decision to have its immediate or proximate source in statute or subordinate legislation.

It is clear that the decision to terminate a contract is usually sourced in the contract itself rather than an enactment.[64] However two conflicting lines of authority emerged in both jurisdictions regarding decisions of statutory bodies to enter contracts. Under the first approach, adopted by the Federal Court in *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd*[65] and *James Richardson Corporation Pty Ltd v Federal Airports Corporation*,[66] the decision of a statutory body to enter a contract was held to be a decision 'under an enactment', because the source of the decision was the constituting statute which conferred a general power to contract on the body. The same reasoning was applied in New Zealand in *Webster v Auckland Harbour Board*,[67] although there the statutory powers to contract were of a more specific nature. The Court of Appeal in any case found that the fact that the Board was a public body administering assets which it held for the benefit of the public was sufficient to attract judicial review.[68]

The contrary view, adopted by the Federal Court in *General Newspapers Pty Ltd v Telstra Corporation*,[69] requires a decision to be expressly authorised or required by statute if it is to be amenable to judicial review. Where a GOC is only generally empowered to enter contracts, it is a 'mere conferral of capacity to act'.[70] This applies whether it is a company GOC which derives its powers from the Corporations Law, or a statutory GOC which derives its powers from specific legislation. Although ultimately the power to contract may be traced to statute, the statute is not the immediate source of power.[71] The same approach was adopted by the New Zealand Court of Appeal in *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd (AEPB Case)*,[72] where Richardson J said that:

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62 These relate to the decisions of Queensland Rail, ports corporations, Queensland Investment Corporation and electricity entities: *Judicial Review Act 1991* (Qld), s. 18A, Schedule 6. For the Commonwealth, see *Administrative Decisions (Judicial Review) Act 1977* (Cth), Schedule 1.

63 This test is also used in other statutory jurisdictions. This article does not consider the additional situation in s. 4(b) of the *Judicial Review Act 1991* (Qld), regarding a decision under a non-statutory scheme using public funds.

64 *Australian National University v Burns* (1982) 43 ALR 25. See also *Australian Film Commission v Mabey* (1985) 59 ALR 25; *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563; *Federal Airports Corporation v Makucha Developments Pty Ltd* (1993) 115 ALR 679; *Blizzard v O'Sullivan* [1994] 1 Qd R 112.

65 (1985) 60 ALR 284.

66 (1993) 117 ALR 277

67 [1987] 2 NZLR 129.

68 Ibid, 131 per Cooke P; 134 per Casey J.

69 (1993) 117 ALR 629.

70 Ibid, 637 per Davies and Einfeld JJ, Gummow J agreeing.

71 See also *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 122 ALR 724; *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 123 ALR 215, 224 per Burchett J.

72 [1993] 1 NZLR 551, per Richardson, McKay and Robertson JJ.

> the commercial operations of an organisation do not become subject to judicial review simply because the organisation is recognised by statute or owes its existence to a specific statute or a general statute such as the Companies Act.[73]

It is submitted that the *General Newspapers* approach, which is the currently accepted view in Australia, is the more coherent and consistent approach for GOCs. It does not single out a GOC for judicial review on the technical basis that its powers are conferred by a specific rather than a general statute. There should there be no difference between the decisions of statutory and company GOCs, which are basically intended to operate in the same way under GOC legislation, when they are entering an identical transaction. The alternative approach creates an artificial distinction between powers conferred by the Corporations Law and by specific legislation, and taken to its logical extent, should therefore also apply to any corporation, as ultimately their powers are all derived from the Corporations Law.

A possible further basis for review is any general obligation of 'social responsibility' in GOC legislation.[74] In the *AEPB Case*, the Court found that s. 4 of the New Zealand Act,[75] which provided that the principal objective of a GOC was to operate as a successful business, but also to exhibit a sense of social responsibility, did not provide grounds for review of the decision of a GOC to terminate a contract for the supply of electricity to a long term customer. Compliance with s. 4 was not a justiciable issue, but a matter for shareholder and political accountability. The commercial success or social responsibility of the GOC would be determined in the course of time, and it was a matter for the GOC to determine the best way to achieve that.[76] In Australia, a similar approach was taken by Burchett J in *Yarmirr v Australian Telecommunications Corporation*[77] in relation to a statutory obligation to supply a standard telephone service which was reasonably accessible to all people in Australia.

The opportunity to settle these issues arose on appeal from the *AEPB Case*, in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*.[78] The Privy Council reversed the Court of Appeal's decision, and held that the decisions of GOCs should in principle be subject to judicial review, largely because of their public ownership and the consequent requirement that they act in the public interest. This conclusion, set out in the passage quoted earlier, was reached with a minimal level of reasoning, other than that judicial review applies to decisions made by 'the executive or by a public body'.[79] No convincing rationale for the application of judicial review of GOCs at common law or under statutory judicial review was provided. Apart from the fact of public ownership, this reasoning could equally apply to many private corporations. The judgment did not explain how the GOC was exercising 'statutory power' for the purposes of the 1972 Act, and in particular whether that occurred because of s. 4. It also seemed to merge the different considerations for statutory and common law review into the same analysis.

However the Privy Council did go on to find that it was for the GOC to determine whether its principal objective would best be served by allowing the contractual arrangements to continue or by terminating them. Thus

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73 Ibid, 560. See also *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699.

74 e.g. *State Owned Corporations Act 1989* (NSW), s. 8(c).

75 *State Owned Enterprises Act* 1986 (NZ).

76 [1993] 1 NZLR 551, 560 per Richardson, McKay and Robertson JJ.

77 (1990) 96 ALR 739.

78 [1994] 1 WLR 521.

79 Ibid, 526.

> it does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods and services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.[80]

The decision therefore seems to reach a compromise between the two approaches by providing for the operation of judicial review in principle, but in an extremely limited form,[81] and without addressing the fundamental issues in question. This may have been an attempt to address the concern that a GOC could potentially have 'all its commercial operations subject to constant judicial review',[82] but it seems an unsatisfactory conceptual basis for deciding the question.

The limitations of judicial review in commercial contexts

The courts have yet to find a coherent rationale for the application of judicial review to GOCs, and have struggled with the contradiction between the requirement that public bodies be subject to the scrutiny of the courts, and the private and commercial nature of their contractual dealings. The debate over GOCs perhaps reflects the inability of administrative law to modify or adapt its 'red light' approach[83] of restraining the exercise of government power to an altered method of government service delivery. The obvious argument against judicial review for GOCs is one of 'competitive neutrality', that the GOC is unable to compete with private competitors who are not subject to the same obligations. However that argument is valid only if judicial review is not otherwise an appropriate measure for the commercial activities of GOCs. If it is appropriate then perhaps it is a cost which should be met.[84] Accordingly what is important is to look at the suitability of judicial review in the context of commercial transactions.

It is apparent that it is difficult to apply a model used for reviewing regulatory determinations which subject a citizen to legal control to the commercial activities of GOCs, where transactions are, at least in law, voluntarily entered.[85] This is particularly the case for an arms length commercial transaction with other corporations of similar size and power, which arguably have an equal capacity to affect the rights of the GOC as the GOC has to affect their rights. Judicial review requires an identifiable final or operative 'decision' which can be challenged.[86] This reflects the determinative nature of 'administrative' decisions, and is not suitable for the wide variety of commercial conduct which may be engaged in by a GOC, even though the entry or refusal to enter into contracts may be categorised as a decision for the purposes of administrative law.

One objective of judicial review is to improve government decision making generally, but there is a danger that it may have the opposite effect on the quality of commercial decisions made by a GOC, which require some robustness and risk taking.[87] The prospect of judicial review may lead to a timidity in commercial decisions which impairs the efficiency of the GOC, and works against the very purpose of corporatisation. The negative effect therefore

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80 Ibid, 528-529.

81 For criticism of these narrow grounds of review, see M Taggart, 'Corporatisation, Contracting and the Courts' [1994] *Public Law* 351.

82 *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 *NZLR* 699, 707 per Woodhouse P.

83 C Harlow and R Rawlings, *Law and Administration* (1984), Chapters 1 and 2.

84 See Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995), para 4.21-4.24.

85 A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363.

86 *Australian Broadcasting Tribunal v Bond* (1990) 190 CLR 321, 336-337 per Mason CJ, Brennan and Deane JJ agreeing.

87 The warning of Mason CJ regarding impairment of the efficient administration of government, in *Australian Broadcasting Tribunal v Bond* (1990) CLR 321, 336-337, also seems applicable in this context.

extends beyond the simple cost of judicial review proceedings. The GOC could not be adequately compensated by the government for this effect on its decision making ability, which would be impossible to quantify.[88]

The decisions reflect a clear reluctance on the part of the courts to involve themselves in commercial decisions, lest that lead to consideration of the merits of the decision or commercial issues which they are ill equipped to judge. As the considerations involved in commercial decisions are not as clearly identifiable as express or implied statutory criteria, by what criteria would the court judge the decision?[89] The paradox is that it is difficult to see how the court could apply the usual grounds of review to a commercial decision, particularly the wide grounds available in statutory judicial review, without intruding into these issues, yet the grounds suggested by the Privy Council in *Mercury Energy* are so narrow they would be rarely invoked.

The impact of competition in controlling the commercial activities of GOCs should also not be underestimated. The Administrative Review Council has concluded that where an enterprise is subject to competition, the use of judicial review should be constrained to allow 'more appropriate' contractual or trade practices remedies to operate.[90] These conclusions have received some criticism,[91] but they are correct. Effective competition acts as a powerful mechanism for customer service and accountability for its decisions, and for efficient behaviour. The individual will have little need for the assistance of administrative law remedies where he has a genuine choice in relation to the delivery of services. The ability to take one's custom elsewhere is a more effective mechanism of individual justice in a commercial context than judicial review could provide, and other remedies will be more appropriate, particularly in their ability to provide monetary compensation.

The application of judicial review to GOC activities

There are therefore a number of reasons why judicial review may not be suitable as a remedy for commercial decisions. Further, a commercial decision almost always does not involve the exercise of 'government' power (in the sense described above), which is the usual focus of judicial review. The fact that in some circumstances the 'voluntary' nature of the contract may be largely illusory does not detract from the observation. In such a case the compulsion arises from the lack of competition rather than a power conferred by government. If the judicial review regime is to apply to GOCs in this situation, it should also logically apply to the commercial decisions of any body in the same circumstances.

In this sense the *General Newspapers* approach does recognise the distinction between government and non-government power in the particular transaction, for the purposes of statutory judicial review. The statement by Davies and Einfeld JJ in *General Newspapers* that judicial review does not apply to 'acts taken under the general law applicable in the community'[92] refers to the lack of government power in those acts. If the direct or proximate source of power is statute, then the GOC is exercising government power. However if the statute merely provides the GOC with a general capacity to act, it removes the connection with government power, and the power arises from the general law. For this reason the

88 cf N Dixon, 'Should Government Business Enterprises be Subject to Judicial Review?' (1996) 3 *AJAL* 198 at 203.

89 See *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 219 per Mason J, regarding the difficulty of applying judicial review to exercises of the prerogative.

90 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995).

91 M Allars, 'Private Law But Public Power: Removing Administrative Law From Government Business Enterprises' (1995) 6 *Public Law Review* 44.

92 (1993) 117 ALR 629 at 633 per Davies and Einfeld JJ, Gummow J agreeing.

General Newspapers approach is to be preferred to the broad assumptions inherent in the decision in *Mercury Energy*.

It may be that the requirement that the decision be of 'an administrative character' could also have a role in limiting review of commercial decisions. It is clear that a decision is not deprived of an administrative character merely because it is 'commercial'.[93] In *James Richardson*, Cooper J considered that a decision to accept a tender was administrative, in relation to the decision of an 'administrative body' in the discharge of statutory functions.[94] However it is difficult to see how a purely commercial transaction of a GOC can be so categorised. If this requirement is interpreted to exclude decisions which are clearly 'commercial' and have no regulatory or social service aspect,[95] it is not necessarily inconsistent with the authorities, where the courts have not had to consider a commercial government business transaction.

In cases of common law judicial review, a simple 'public function' or public ownership test, as given in *Mercury Energy*, is not sufficient. Just as it should not automatically be assumed that all actions of GOCs are private and beyond administrative law, it should also not be assumed that public ownership means that all decisions may be challenged. The difference between commercial and other functions, and between government and non-government powers, should be considered in the context of the particular transaction. Admittedly it is sometimes difficult to differentiate between these functions, but it is an explicit objective of corporatisation to clearly separate them. It should be possible to make the distinction with GOCs.

This is not intended to suggest that judicial review has no role in providing remedies for individuals for the unlawful conduct of GOCs. It will still be appropriate in some contexts. The clearest of these is the exercise of regulatory functions conferred by statute. Where a GOC acts under the direct force of legislative enactment to regulate the conduct of persons, it exercises government power. Keeping the exercise of that power within lawful bounds is within the established requirements of both statutory and common law judicial review.[96] Where the regulatory function is not explicitly stated in legislation, the decision in *R v Panel of Take-overs and Mergers; Ex parte Datafin*[97] provides some support for the application of common law judicial review. In that case, because the government had made a conscious decision to withdraw from regulation and allow the Panel to be the regulator, in the circumstances the power the Panel exercised was seen as governmental.[98] However it should be noted that *Datafin* related only to decisions of a regulatory nature which affected the rights of persons under its consensual jurisdiction. Nothing in *Datafin* supports the application of judicial review to purely commercial decisions of GOCs or any other body.

There is also some role for judicial review in the area of social service functions, where the GOC is acting under a direction from the government to achieve a specific 'public' objective.

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93 *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284; *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1993) 117 ALR 277.

94 (1993) 117 ALR 277, 280.

95 cf *British Columbia Development Corporation v Freidmann* [1984] 14 DLR (4th) 129, where a decision was seen as both commercial and the implementation of government policy, which made it a 'matter of administration' for the purpose of the Ombudsman's jurisdiction. See A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363 at 368-371.

96 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 388, 408 per Lord Diplock.

97 [1987] 1 QB 815.

98 It has been argued that a connection with government is unnecessary, and that 'de facto monopolistic powers' should be sufficient: D Pannick, 'Comment: Who is Subject to Judicial Review and in Respect of What?' [1992] *Public Law* 1, 4. See also *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 123 ALR 215, 224 per Beaumont J.

This is particularly the case where there is an obligation or specific power to carry out an objective directly imposed by statute. A decision made in pursuance of such an obligation would be a decision 'under an enactment' for the purposes of statutory judicial review, because the statute expressly requires the action. Such a decision would also be amenable to common law judicial review as the exercise of a statutory function.[99] GOC legislation requires CSOs to be imposed by the statement of corporate intent or other agreement, or Ministerial directions. There may arguably be a place for judicial review in the delivery of CSOs, even though CSOs will often be implemented through the vehicle of a commercial transaction.[100] It may be difficult to characterise a decision made by the GOC in performance of CSOs as 'under an enactment' unless it is expressed in legislation,[101] but a GOC could be amenable to common law judicial review in relation to any failure to carry out or comply with those objectives. The CSO is a social objective, the performance of which the government has expressly delegated to the GOC by statutory direction, and there is an identifiable public interest in which the GOC must act, which may create grounds for review.

Admittedly many CSO obligations are expressed as broad, general duties, which the courts have difficulty transforming into enforceable legal obligations.[102] However where an obligation is clearly specified, non-compliance with the obligation may give rise to judicial review.[103] The question of whether a requirement of 'social responsibility' in GOC legislation could be the basis for review for the delivery of CSOs remains open. The broad basis for judicial review of GOCs suggested in *Mercury Energy* made a decision on that issue unnecessary. It is doubtful that the weaker requirements in the Victorian and Queensland Acts would be sufficient,[104] but it is arguable that a statutory requirement to act with social responsibility could be interpreted to require the proper performance of social service functions, if not purely commercial ones. However if a decision of a GOC regarding the delivery of social services is not amenable to judicial review, decisions or directions by the government itself in the governance of the GOC may be subject to such review.[105] It is possible that judicial review could be invoked for decisions by shareholding Ministers to give directions to GOCs, such as the amendment or removal of a particular social program, subject to the reluctance of the courts to review the political or policy decisions of Cabinet.[106]

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99 See *R v British Coal Corporation; Ex parte Vardy* (1994) 6 Admin LR 1, 38 per Glidewell LJ.

100 Lucas argues that commercial decisions should be subject to judicial review where they are used as an instrument of government or social policy: A Lucas, 'Judicial Review of Crown Corporations' (1987) 25 *Alberta Law Review* 363, 368-371.

101 In terms of the GOC Act (Qld), a Statement of Corporate Intent would not satisfy the definition of a 'Statutory instrument', nor could the decision be seen as made under a Ministerial direction made under the Act, for the purposes of s. 4 of the *Judicial Review Act 1991* (Qld).

102 *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739.

103 Subject to requirements of standing, if a special interest can be shown.

104 Section 20 of the GOC Act (Qld) only requires a GOC to 'be commercially successful in the conduct of its activities and efficient in the delivery of its community service obligations', while s. 18 of the *State Owned Enterprises Act* 1992 (Vic) requires a SOE to act for the public benefit, but only in terms of efficiency and contribution to the economy.

105 *New Zealand Maori Council v Attorney-General* [1993] 1 NZLR 513.

106 *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

General Law Remedies[107]

It has been argued above that where a GOC is constrained by effective competition and its powers are derived generally from the Corporations Law or another statute, it may not be exercising any government or market power in its commercial dealings, and judicial review is not appropriate in these situations. However where the GOC is providing an 'essential service' such as gas, electricity or water, and is the only supplier, the citizen is placed in a more vulnerable position due to the lack of proper choice. An obligation to act fairly in these cases is more compelling. But this problem still arises as a result of market power, not because the GOC is publicly owned. A key element of National Competition Policy is to reform the structure of industries to introduce competition wherever possible. Where this is done and effective competition exists, these problems will be unlikely to arise. If this cannot be achieved, protection mechanisms need to be put in place, such as prices oversight and access regimes, preferably at the same time as corporatisation. [108] The use of other mechanisms such as an industry Ombudsman or government regulation of the industry may also be appropriate, and trade practices and other general law remedies assume greater importance.

In a case where a GOC is not exercising government power, but only possesses market power, the development of general law remedies would seem to be more appropriate for protecting the interests of the individual, because it is a power that could equally be exercised by public or private bodies. There is already some indication that the general law is being infused with the values of public law, particularly in cases regarding clubs, trade unions, domestic tribunals,[109] and even sporting clubs,[110] where an obligation to provide procedural fairness has been implied because the decision maker occupies a position of power due to a *de facto* monopoly over the regulation of the activity in question, and has the ability to affect the person's livelihood. This seems a better approach for the protection of consumers in a deregulated setting.[111]

This approach was not tested in a number of cases in England following *Datafin*, regarding bodies such as the football association, greyhound association and jockey club,[112] where the aggrieved persons sought remedies by way of judicial review. However it may have been more fruitful to challenge the decisions on a general law basis, perhaps through the law of contract, because that would not have required categorising the power exercised as 'public' power.[113]

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107 The term 'general law' is used rather than 'private law', because it applies equally to government and to other persons, e.g. see *Judiciary Act* 1903 (Cth) s. 64; *Crown Proceedings Act* 1980 (Qld) s. 9(2); *Northern Territory v Mengel* (1995) 185 CLR 307. The term 'private law' perpetuates the artificial distinction between public and private spheres.

108 e.g. *Competition Authority Act 1997* (Qld), Parts 3 and 5.

109 *Dickason v Edwards* (1910) 10 CLR 243; *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329; *Australian Football League v Carlton Football Club Inc* (Vic CA, 25 July 1997, unreported).

110 *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242.

111 It has also been suggested that the common law duty upon monopoly providers to supply at a reasonable price be applied: M Taggart, 'Corporatisation, Privatisation and Public Law' (1991) 2 *Public Law Review* 77 at 105-107. However in view of the immense difficulties encountered by the courts in establishing a 'reasonable' price, this seems unrealistic*: Telecom Corp of New Zealand v Clear Communications Ltd* (1994) 5 NZBLC 103, 552.

112 *R v Disciplinary Tribunal of the Jockey Club; Ex parte Aga Khan* [1993] 2 All ER 853 and other 'jockey club' cases cited therein; *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302; *R v Football Association Ltd; Ex parte Football League Ltd* [1993] 2 All ER 833.

113 See *Mercury Communications v Director General of Telecommunications* [1994] 1 WLR 48, where the House of Lords allowed the challenge of a regulatory decision by a government decision maker on the basis of contract, even though judicial review may arguably have been available.

The way forward for regulating the commercial conduct of GOCs may be shown by the recent decision in *Hughes Aircraft Systems*,[114] where Finn J was prepared to imply a contractual duty to act fairly upon the Civil Aviation Authority, because the Authority was a public body, but also because of the circumstances relating to the particular tender. Although it has been argued that public ownership *per se* is not a sufficient basis to impose such a duty, it may however be appropriate to impose a duty in particular circumstances, such as where the behaviour of the GOC is not constrained by competition. However such a duty would arise not merely because of its public ownership.[115] The same obligation would then be imposed on any person in the same position, whether public or private. Thus in *General Newspapers*, the court seemed to hint that general law remedies might be applicable for the calling of tenders by GOCs in circumstances where rights of fairness could be implied.[116] If these remedies are developed, there is also no need to require GOCs to act as a 'model business', as the values of the market place should be sufficient.[117] Legal obligations which are not imposed on the basis of ownership alone will provide a more coherent means of securing justice for individuals.

Conclusion

It is said that 'behind any theory of administrative law there lies a theory of the state',[118] and the arguments in this article are perhaps an example of this. However it also means that that courts need to recognise the changing nature of the state,[119] and the nature of the power it exercises in the context of the relevant transaction. The fact is that governments do engage in commercial activity, and now choose to do so through the vehicle of GOCs with a hybrid nature and varied functions and powers. The recognition by the courts that public ownership is not of itself an adequate criterion for the application of public or private law remedies will be a considerable start in ensuring that the objectives of corporatisation are not frustrated.

114 (1997) 146 ALR 1.

115 See also *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 *NSWLR* 234, 270-271 per Priestley JA; *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181; J McLean, 'Contracting in the Corporatised and Privatised Environment' (1996) 7 *Public Law Review* 223.

116 (1993) 117 ALR 629, 637 per Davies and Einfeld JJ, Gummow J agreeing.

117 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law* (1995), para 4.17.

118 C Harlow and R Rawlings, *Law and Administration* (1984), p. 1.

119 See Sir Ivor Richardson, 'Changing Needs for Judicial Decision Making' (1991) 1 *Journal of Judicial Administration* 61, 63.