

THE OMBUDSMEN: TIME FOR A JURISDICTIONAL EXPANSION THE CASE FOR EXTENDING THE JURISDICTION OF THE STATUTORY OMBUDSMEN TO COVER THE EXERCISE OF PUBLIC POWER IN THE PRIVATE SECTOR

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The diffusion of public power in New Zealand through state sector reforms is well documented. As "public functions" are increasingly exercised by "private" bodies other than the traditional array of Ministries and Departments, the questions arise as to whether the "public law" tools that have historically accompanied such exercise continue to apply. This article argues that one such "tool", the Ombudsman, is particularly suited to application in the control of the exercise of public power by the private sector. In doing so, the author traverses the arguments made for extending the application of public law tools to the private sector, the extent to which public laws have so far been applied to private sector exercises of public power, and the particular reasons for extension of the jurisdiction of the Ombudsmen thereto.

I INTRODUCTION

New Zealand has a liberal array of public law tools available to protect individuals from arbitrary or oppressive administrative action.¹ Judicial review, the Ombudsmen, the

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¹ *Re British Columbia Development Corporation and Friedman* (1984) 14 DLR (4th) 129 (SCC) interpreted the phrase "a matter of administration" to encompass everything done by governmental

Official Information Act 1982, the Privacy Act 1993, the Office of the Controller and Auditor-General, the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, and the Protected Disclosures Act 2000 are all public law tools designed to ensure that public power is exercised in accordance with the principles of good administration.

Following New Zealand's state sector reforms of the 1980s and 1990s, and the extensive corporatisation, privatisation and contracting-out that marked those reforms, the exercise of public power is now shared between the public and private sectors. Furthermore, it is widely recognised that public power is exercised by bodies that were never in the public sector.² This represents a potential danger to citizens because the protection afforded by administrative law, which includes the public law tools, is generally not available against bodies in the private sector. Similar developments overseas have given rise to a significant body of argument that advocates the extension of administrative law into the private sector.³

New Zealand has responded by extending some of its public law tools designed to protect citizens from improper administrative action into the private sector. For example, judicial review,⁴ the New Zealand Bill of Rights Act 1990⁵ and the Protected Disclosures Act 2000⁶ all apply to parts of the private sector. Other public law tools, however, remain restricted to application in the public sector. The contention of this paper is that this jurisdictional limitation is particularly troublesome in relation to the Ombudsmen, who are arguably the most accessible and effective mechanism available to citizens affected by

authorities in the implementation of government policy, and to exclude only the activities of the legislature and the courts.

- 2 Sir Gordon Borrie "The Regulation of Public and Private Power" [1989] Public Law 552, 561.
- 3 See A R Galbraith "Deregulation, Privatisation and Corporatisation of Crown Activity: How will the Law Respond?" (New Zealand Law Conference: The Law and Politics, Wellington, March 1993) 226; Lord Woolf "Droit Public – English Style" [1995] Public Law 57; Michael Taggart "Corporatisation, Privatisation and Public Law" (1991) 2 PLR 77; Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997); Borrie, above n 2.
- 4 *R v Panel of Takeovers and Mergers, ex parte Datafin Plc* [1987] 1 All ER 564 (CA) [*Datafin*]; *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) [*Cameron*]; *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) [*Finnigan*]; *Coleman v Thoroughbred & Classic Car Owners' Club Inc & Anor* 16 TCL 29/6; [1993] NZ Recent Law 389 (HC) [*Coleman*]; *Royal Australasian College of Surgeons v Phipps* [1998] 3 NZLR 1 (CA).
- 5 *Sharma v ANZ Banking Group (New Zealand) Ltd* (1992) NZBORR 183 (CA)[*Sharma*]; *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA) [*TV3 Network Ltd*]; *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC)[*Lawson*].
- 6 Protected Disclosures Act 2000, s 3.

improper exercise of public power. It is time, therefore, to extend the Ombudsmen's jurisdiction to cover the exercise of public power in the private sector.

The notion of public power is difficult to define. Public power used to be the equivalent to statutory power, because it was via statutory power that the State exercised its functions.⁷ Now that the State uses a broader range of techniques to achieve its will, such as contracting, corporatising and privatising, this conception of public power is too narrow. Also, the increased power of wholly private organisations to affect the every day lives of citizens is further blurring the public/private divide.⁸ There is now substantial judicial and academic recognition that it is not the source of a power that makes it public, but the *nature* of the power.⁹ This means that a statute is no longer the touchstone of public power, and that a private body may be exercising public power if its power is sufficiently public in nature. A particular power is often said to be public in nature if it is a public function exercised in the public interest. For example, the courts have said mail handling is a public function exercised in the public interest.¹⁰ Similarly, regulatory power is by nature public because it strives to protect the public interest, and so any body with regulatory functions are exercising public power, whether public or private.¹¹ A particular power might be considered public in nature if:

- (1) the power affects the rights of citizens;¹²
- (2) it is exercised by a governmental body;¹³
- (3) it used to be exercised by a governmental body;¹⁴

7 Janet McLean "Personality and the Public Law Doctrine" (1999) 49 U Toronto LJ 123, 143.

8 Borrie, above n 2, 558.

9 See *Council for Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL) [*Council for Civil Service Union*]; *Datafin*, above n 4; *Cameron* above n 4; *Finnigan* above n 4; McLean, above n 7; Borrie, above n 2; Lord Woolf, above n 3; Paul Craig "Public Law and Control Over Private Power" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 196.

10 *Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd* (1992) 3 NZBORR 339, 394 McGechan J [*Federated Farmers*].

11 See *Datafin*, above n 4; *Cameron* above n 4.

12 See *Datafin*, above n 4; *Cameron* above n 4; *Federated Farmers* above n 10.

13 See *Federated Farmers*, above n 10; *Mercury Energy Ltd v Electricity Corporation of New Zealand* [1994] 2 NZLR 385, 388 (PC) [*Mercury Energy*].

- (4) the government would exercise the power if a private body did not;¹⁵
- (5) the power is regulatory;¹⁶
- (6) the power is regulated by government;¹⁷
- (7) there is statutory recognition of the power.¹⁸

To say that public power should be exercised in accordance with the principles of good administration means that public power should be exercised legally, reasonably, fairly, efficiently and accountably.¹⁹ In the interests of brevity, this phrase will be shortened to state that public power should be exercised properly, or not improperly.

Part II of this paper outlines the current structure of the State and illustrates that significant public power is exercised in both the public and private sectors. Part III then canvasses a persuasive body of theory that advocates the extension of administrative law into the private sector. Part IV sets out New Zealand's response to these arguments by outlining the jurisdictions of the various public law tools, and shows that while some extend into the private sector, others remain restricted to the public sector. Part V focuses on the Ombudsmen, arguing that the philosophy and nature of the Ombudsmen makes them appropriate for the private sector, and that due to the significant public power now exercised in the private sector, the Ombudsmen's jurisdiction should be extended into the private sector. Part VI suggests a possible legal mechanism for extending the jurisdiction of the Ombudsmen into the private sector.

It is important to note that there is a myriad of other mechanisms that also provide checks on administrative action. These include bodies such as the Police Complaints Authority, the Health and Disability Commissioner and the Benefits Review Committee. There are also political mechanisms such as Parliament and its select committees, petitions, and the media. However, the focus of this paper is on the legal mechanisms that apply broadly across the administrative sector, rather than the political mechanisms, or the bodies concerned with only one specific area or aspect of decision making.

14 See *Datafin*, above n 4; *Cameron* above n 4; *Borrie*, above n 2; Michael Taggart "Corporatisation, Privatisation and Public Law" (1991) 2 PLR 77.

15 See *Datafin*, above n 4; *Cameron*, above n 4.

16 See *Datafin*, above n 4; *Cameron*, above n 4.

17 See *Federated Farmers*, above n 10; *Sharma*, above n 5; *TV3 Network Ltd*, above n 5.

18 See *Datafin*, above n 4; *Cameron*, above n 4.

19 Galbraith, above n 3, 229.

II WHERE PUBLIC POWER IS EXERCISED IN NEW ZEALAND

A Public Power in the Public Sector

Prior to the economic and social restructuring of the 1980s and 1990s, public power in New Zealand was exercised almost exclusively by the State. A large governmental infrastructure included the core public service and other statutory bodies, as well as the ownership and provision of public utilities,²⁰ banking services, airline services, forestry and other industries. The election of the fourth Labour Government in 1984 ushered in a programme of considerable state sector reform. According to Boston and others, the contemporary state sector is the product of a period of remarkable convulsion since the mid-1980s:²¹

Its architecture has been redesigned on a scale and at a pace that in earlier times would have been thought impossible...Indeed the number of [State] employees has almost halved in the last decade due to a number of factors, the most important being fiscal constraints, corporatisation, privatisation, contracting out of central government functions, and general departmental restructuring.

Nevertheless, considerable public power is still exercised by the State. Boston et al broadly describe the state sector as consisting of:²²

- (1) Parliament;
- (2) The Judiciary;
- (3) Central government;
- (4) Crown entities;
- (5) Local Government;
- (6) The organisations within the health and education sectors;
- (7) State Owned Enterprises (SOEs).

20 "Public utilities" refers to individuals and companies providing the public (or a section of it) with gas, water, telephone, telegraph, transportation and telecommunications or electricity. See Michael Taggart "Public Utilities and Public Law" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 214.

21 Jonathan Boston, John Martin, June Pallot, Pat Walsh *Public Management: The New Zealand Model* (Oxford University Press, Auckland, 1995) 58.

22 *Public Management*, above n 21, ch 3.

As each of these organisations are part of the state sector, their power is by its nature "public". Therefore, most of them are subject to the public law tools designed to ensure that public power is exercised properly. The exceptions are the Legislature and the Judiciary which, although subject to the New Zealand Bill of Rights Act 1990, are not subject to the other public law tools. This preserves the supremacy of Parliament and the independence of the Judiciary, and is consistent with the role of the tools as checks against administrative action, rather than legislative or judicial action.²³

B Public Power in the Private Sector

An outline of the current state sector does not provide the entire picture of where public power is exercised in New Zealand. The restructuring of the state sector saw the State give up its monopoly on the exercise of public power, and transfer much of it to the private sector. For example, following an extensive governmental programme of privatisation, the private sector now delivers most public utilities in New Zealand.²⁴ Also, the option of contracting-out government services to private providers, or outsourcing, is widely observed by central and local government agencies. Government has always contracted organisations such as IHC and Plunket to perform certain public health functions, but the range of services being outsourced to private sector providers is increasing.²⁵ For example, the management and operations of a prison have recently been contracted to a private company.²⁶ Also, local government services, such as water supply, rubbish collection and city operations, are increasingly being contracted-out.²⁷

The private provision of public utilities and outsourced governmental services may be categorised as exercises of public power because they used to be provided by the public sector, and so by nature are public. The nature of a service provided does not change just because it is provided by the private sector.²⁸ This is a very important notion, but to concentrate on it alone ignores another facet of the exercise of public power. There are

23 See *Re British Columbia Development Corporation and Friedman*, above n 1.

24 Examples include Telecom, New Zealand Rail, and some of the electricity generation and lines companies.

25 *Public Management*, above n 21, 180.

26 The Auckland Central Remand Prison, which is privately managed, opened in July 2000.

27 Figures from 1995 show that delivery of services by council departments was down from 70 per cent to 26 per cent, while delivery by business units and external providers rose from 2 per cent to 18 per cent and from 22 per cent to 48 per cent respectively. See *Public Management*, above n 21, 196.

28 Lord Woolf, above n 3, 63.

private bodies in New Zealand which exercise public power, but were never part of the state sector. For instance, private companies whose activities are regulated by government arguably exercise public power. A good example is the banking industry, certain aspects of which are regulated by statute.²⁹ Self-regulatory bodies are another kind of body falling into this category, such as the Advertising Standards Authority. This is a private incorporated society that regulates the standards of advertisers, and imposes sanctions and penalties on advertisers that breach its standards. Other private bodies exercising public power include private clubs, societies and associations, such as the New Zealand Rugby Football Union, and the Royal Australasian College of Surgeons, the decisions of which affect the rights of their members.

New Zealand is not the only jurisdiction in which state sector reform has moved the exercise of public power into the private sector, and where bodies that were never part of the state sector exercise public power. A significant body of theory from several common law jurisdictions exists arguing that administrative law, and the standards it sets against which to measure the exercise public power, should be extended into the private sector.

III EXTENDING THE SCOPE OF ADMINISTRATIVE LAW INTO THE PRIVATE SECTOR

Perhaps the most vehement argument that administrative law should apply in the private sector has occurred in relation to the private providers of public utilities. Michael Taggart submits that consumers are still as much captive of the privatised entities as they were when the utilities were owned and run by government departments. Before privatisation, trading enterprises had the standard terms and conditions of supply set out in statute. Since privatisation the standard terms and conditions are set out in contract, legitimated by the "consent" of the parties under contract law. However, the terms are of the "take it or leave it" kind because there is no possibility of modification, and usually very little chance of consumers being able to switch to an alternative supplier. While the legal labels change from public to private, the reality of the power imbalance does not change. Therefore, Taggart argues, the principles of good administration should provide a yardstick against which to measure the activities of privatised enterprises.³⁰

Referring to both privatised government services and outsourced government services, Mark Aronson notes that state restructuring has resulted in public and private

29 For example, see the Insolvency Act 1967.

30 Michael Taggart "Corporatisation, Privatisation and Public Law" (1991) 2 PLR 77, 95 ["Corporatisation, Privatisation and Public Law"].

organisations sharing governmental functions. Therefore, tools for achieving the goals of administrative law might have to be adapted to take account of the way in which the state has restructured itself.³¹ Murray Hunt echoes Aronson, arguing that the contractualisation of government has blurred the public/private divide, requiring the courts to assert public law principles over all exercises of public power, regardless of the source of that power.³²

It is important not to focus solely on functions that have been moved from the public sector into the private sector. Using the nature of power as the touchstone for amenability to administrative law rather than the source of the power, it is arguable that *any* private organisation exercising public power should be subject to the standards of public law, even if their functions were never part of the public sector.

Writing extra-judicially, Lord Woolf suggests that bodies such as private clubs, societies and associations should be subject to administrative law. His view is that the nature of an activity should be decisive in deciding whether someone affected by the activity should have the protection of public law. He points specifically to the controlling bodies of sport and religious authorities, which although entirely private, exercise monopolistic power that should be checked by administrative law.³³

Sir Gordon Borrie sums up the above arguments succinctly:³⁴

There seems to me to be a gap in our law when...arbitrary action by a powerful body in the *private* sector seems to give rise to no remedy in the courts for those who suffer from it... As power shifts from the public sector to the private sector, it seems to me desirable that instruments of control and accountability forged to ensure that the public sector behaves itself are considered for appropriate adaptation to the private sector.

Of course this begs the question of what bodies will be subject to administrative law, and what bodies will not. What is considered "public" power, and what is considered "private" power? Lord Woolf provides a distinction, contending that the standards of good administration are too onerous to impose on private entities that operate solely in their own best interests. However, administrative law should recognise that public power

31 Mark Aronson "Responses to Privatisation and Outsourcing" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 40, 69-70.

32 Murray Hunt "Constitutionalism and the Contractualisation of the Government in the United Kingdom" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 21, 38.

33 Lord Woolf, above n 3, 64.

34 Borrie, above n 2, 559, 564.

may be exercised privately, and apply to bodies that perform certain public functions.³⁵ In other words, only organisations whose power is in some way for the benefit of the public at large, rather than for the benefit of the owners or shareholders only, will be subject to administrative law.

Lord Woolf's conception hardly provides certainty, but when the public/private divide is so blurred, uncertainty may be par for the course. Paul Craig also expounds a test based on the nature of the power, asserting that if a body is exercising public law functions, or such functions that have public law consequences, then the body should be subject to public law. He recognises that this generates uncertainty, but says it is the price to be paid for moving away from formalistic tests based upon the source of the power being exercised.³⁶ Moving away from a formalistic test that provides certainty is necessary because public power is exercised so variably.

In response to the restructured state sector, and the subsequent arguments that administrative law should apply in the private sector, New Zealand has in fact extended some of its public law tools into the private sector. Nevertheless, citizens do not have the same protection from public power exercised in the private sector as they have from public power exercised in the public sector. This is because not all the public law tools apply to all exercises of public power in the private sector. To appreciate which public law tools apply to what exercises of power, it is necessary to examine the jurisdictions of the various public law tools.

IV JURISDICTIONS OF THE PUBLIC LAW TOOLS

A Table Summary of Jurisdictions

The following table summarises the jurisdictions of certain public law tools: Judicial Review (JR), the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 (OIA/LGOIMA), the Privacy Act 1993 (PA), the Protected Disclosures Act 2000 (PDA), the New Zealand Bill of Rights Act 1990 (BORA), the Human Rights Act 1993 (HRA) and the Office of the Controller and Attorney-General (CAG).

35 Lord Woolf, above n 3, 61.

36 Craig, above n 9, 199.

	Central government departments, crown entities, SOEs and local government	Private contractors who contract with government	Private clubs, societies and associations	Private regulatory bodies	Private companies exercising public power
JR	YES ³⁷	Possibly ³⁸	YES ³⁹	YES ⁴⁰	Possibly ⁴¹
Omb	YES ⁴²	NO	NO	NO	NO
OIA/ LGOIMA	YES ⁴³	YES ⁴⁴	NO	NO	NO
PA	YES ⁴⁵	YES ⁴⁶	YES ⁴⁷	YES ⁴⁸	YES ⁴⁹

37 Judicature Amendment Act 1972, ss 3, 4; *Mercury Energy*, above n 13; *Council for Civil Service Union*, above n 9; *Burt v Governor-General* [1993] 3 NZLR 672 (CA).

38 Whether the actions of private contractors who contract with the government are open to judicial review depends on the circumstances and whether the requirements of ss 3 and 4 of the Judicature Amendment Act 1972 are satisfied. Guidance may also be taken from *Datafin*, above n 4; *Cameron*, above n 4.

39 In *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA) the Court of Appeal implied that the NZRFU was subject to review, notwithstanding the fact that it was a private and voluntary organisation, because it was in a position of national importance, and its decisions affected the community as a whole. The High Court held in *Coleman v Thoroughbred & Classic Car Owners' Club Inc & Anor* 16 TCL 29/6; [1993] NZ Recent Law 389 (HC) that the Judicature Amendment Act 1972 applied to actions taken by private organisations arising under their codes, and as such reviewed the Thoroughbred & Classic Car Owners' Club Inc. for exercising power with improper purpose. Similarly, in *Royal Australasian College of Surgeons v Phipps* [1998] 3 NZLR 1 (CA) the Court of Appeal held that the Judicature Amendment Act 1972 covered the powers of a body corporate exercised under contract, when that contract was entered into under its constitutional document.

40 *Cameron*, above n 4; *Datafin*, above n 4.

41 *Datafin*, above n 4; *Cameron*, above n 4; *Finnigan*, above n 4.

42 Ombudsmen Act 1975, s 13(1).

43 Official Information Act 1982, ss 2, 12(1); Local Government Official Information and Meetings Act 1987, ss 2, 10(1).

44 Official Information Act 1982, s 2(5).

45 Privacy Act 1993, s 2.

PDA	YES ⁵⁰	YES ⁵¹	YES ⁵²	YES ⁵³	YES ⁵⁴
BORA	YES ⁵⁵	Possibly ⁵⁶	Possibly	Possibly	YES ⁵⁷
HRA	YES ⁵⁸	YES ⁵⁹	YES ⁶⁰	YES ⁶¹	YES ⁶²
C&AG	YES ⁶³	YES ⁶⁴	NO	NO	NO

46 Privacy Act 1993, s 2.

47 Privacy Act 1993, s 2.

48 Privacy Act 1993, s 2.

49 Privacy Act 1993, s 2.

50 Protected Disclosures Act 2000, s 3.

51 Protected Disclosures Act 2000, s 3.

52 Protected Disclosures Act 2000, s 3.

53 Protected Disclosures Act 2000, s 3.

54 Protected Disclosures Act 2000, s 3.

55 New Zealand Bill of Rights Act 1990, s 3(a) and (b); *Federated Farmers*, above n 10; *Lawson*, above n 5; *Mercury Energy*, above n 13; Mai Chen "Judicial Review of State-Owned Enterprises at the Crossroads" (1994) 24 VUWLR 51; Paul Radich and Richard Best "Section 3 of the Bill of Rights" [1997] NZLJ 251.

56 Whether the NZBORA covers private contractors who contact with the government, private clubs, societies and associations and private regulatory bodies will depend on whether the legal tests in s 3(a) or (b) of the statute are satisfied. No direct authority may be cited, but guidance may be taken from *Federated Farmers*, above n 10; *Lawson*, above n 5; *Mercury Energy*, above n 13; *Sharma*, above n 5; *TV3 Network Ltd* above n 5; Chen, above n 55; Radich and Best, above 55.

57 *Sharma*, above n 5; *TV3 Network Ltd*, above n 5; Radich and Best, above 55.

58 Human Rights Act 1993, s 23.

59 Human Rights Act 1993, s 23.

60 Human Rights Act 1993, s 23.

61 Human Rights Act 1993, s 23.

62 Human Rights Act 1993, s 23.

63 Public Finance Act 1977, ss 2, 25(1).

64 Public Finance Act 1977, ss 2, 27.

Comparing the jurisdictions of the public law tools available to ensure that public power is exercised in accordance with the principles of good administration clearly delineates the extent of their different jurisdictions. All the tools are available to check the power of state-owned and controlled bodies, including SOEs. The comparison also illustrates that New Zealand has responded to the transfer of public power into the private sector by extending the jurisdiction of some tools into the private sector.

The extended jurisdiction of these public law tools affords citizens some protection from maladministration in the private sector. However, there two serious limitations. The first is that the range of the tools available in the private sector are limited in their scope. The Bill of Rights Act and Human Rights Act apply only when a breach of human rights is involved, and not to an improper exercise of public power with no human rights component. The Privacy Act relates only to personal information, and the Protected Disclosures Act affords protection only to employees who disclose instances of "serious wrongdoing". Judicial review provides the broadest opportunity for redress, but it is restricted by reasonably stringent legal tests in the area of illegality, unreasonableness and procedural impropriety. There are some developing grounds which promise to extend the reach of judicial review, such as substantive unfairness, but even this ground requires a stringent legal foundation.⁶⁵ The second limitation is that applicants must go to court to get the relief judicial review affords. This is usually prohibited by expense, time delay, and the fact that judicial review often fails.⁶⁶ Furthermore, a successful review may only force a decision to be made again, and does not necessarily change the eventual outcome.

The combined result of these limitations is that in spite of the extension of some tools into the private sector, citizens have little avenue for redress when public power is exercised improperly in the private sector. This poses substantial risk to citizens since considerable public power is exercised in the private sector. It is this risk that gave rise to the argument that administrative law, and the public law tools available to ensure the proper exercise of public power, should apply in the private sector. Also evident in many commentators' writing, however, is a warning that it may not be appropriate to apply the tools in the private sector exactly as they apply in the public sector. Alfred C Aman Jr warns that new governmental approaches that blend public and private power could be

65 See *Whangarei Deep Sea Anglers Club Inc v Marshall* [1995] 1 NZLR 586 (HC); *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA).

66 Of the applications for judicial review in 1997 and 1998 (both substantive determinations and interim orders) around 75 per cent were declined or struck out. See Karen Clark "Defending the Defensible" [1999] NZLJ 306, 311-312; Simon Halliday "The Influence of Judicial Review on Bureaucratic Decision-Making" [2000] Public Law 110.

made inefficient and unduly burdensome by the imposition of procedural models that fail to take into account the need for efficiency as dictated by new global realities.⁶⁷ Craig puts the case as:⁶⁸

The fact that a particular institution is felt to possess public power should not lead inexorably to the conclusion that all principles of a public law nature should be equally applicable to such bodies; the more broad ranging is our definition of public power, the more we require a nuanced approach in order to determine which of the public law principles should be held to apply to a body which appears somewhere along the line of the institutional spectrum of public power.

This paper contends that the very nature of the Ombudsmen and their operational ethos may provide the "nuanced" approach that Craig advocates. This contention is backed up by the observations of others, such as Sir Gordon Borrie, who have stressed that the ombudsman idea has proved itself a valuable independent complaints investigation instrument right across the boundaries of the public and private sectors.⁶⁹ When writing about the private delivery of public services, Stephen Owen, a British Columbian Ombudsman, wrote:⁷⁰

There must be an effective accountability system to ensure integrated resource management and consensual dispute resolution outside the traditional public and private sector mechanisms. Ombudsmen's offices are well placed to give leadership in this area.

V EXTENDING THE OMBUDSMEN INTO THE PRIVATE SECTOR

A Rationale for Extending the Ombudsmen into the Private Sector

Primarily, the rationale for extending the Ombudsmen into the private sector is the same as the rationale for their existence in the public sector. Its purpose in the public sector is to investigate complaints received from members of the public who feel that they have been treated unfairly by some act, omission, decision or recommendation of a central or local government organisation.⁷¹ Its purpose would be the same in the private sector,

67 Alfred C Aman Jr "Public Law and Control Over Private Power" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 90, 117.

68 Craig, above n 9, 211.

69 Borrie, above n 2, 565.

70 Stephen Owen "The Expanding Role of the Ombudsman in the Administrative State" (1990) 40 U Toronto LJ 670, 681.

71 Office of the Ombudsman *Purpose of the Ombudsman* (Wellington, 2000) <<http://www.ombudsmen.govt.nz/purpose.htm>> (last accessed 13 June 2000).

except that it would receive complaints from members of the public who feel they have been treated unfairly by some act, omission, decision or recommendation of any organisation exercising public power, either public or private. The particular rationale that justifies extending the Ombudsmen into the private sector is essentially threefold.

1 Affording citizens the greatest possible protection

The Ombudsmen have proved citizens' best means of gaining redress against the improper use of public power in the public sector. This is because the Ombudsmen are both readily accessible, and very effective in getting the recourse citizens desire. The Ombudsmen's accessibility comes from the fact that their services are free, and that a complaint may be made either in writing or orally.⁷²

The Ombudsmen's effectiveness is proven by the fact that their recommendations have developed an enviable record of being adopted, even if not in the short term, then certainly in the medium and long terms.⁷³ The Ombudsmen's effectiveness is due to a number of factors:⁷⁴

- (1) the Ombudsmen undertake their work despite, or beyond, the usual legal frameworks and are called on to act when no parliamentary, legal or administrative recourse is ordinarily available or practicable;⁷⁵

72 Ombudsmen Act 1975, s 16(1).

73 Judge Anand Satyanand "The Office of the Ombudsman in New Zealand" (1997) 6 *Canta LR* 470, 479.

74 Satyanand, above n 73.

75 Section 22 of the Ombudsmen Act 1972 states that after completing their investigations the Ombudsmen can recommend to the appropriate department or organisation that (a) the matter should be referred to the appropriate authority for further consideration; or (b) the omission should be rectified; or (c) the decision should be cancelled or varied; or (d) any practice on which the decision, recommendation, act, or omission was based should be altered; or (e) any law on which the decision, recommendation, act, or omission was based should be reconsidered; or (f) reasons should have been given for the decision; or (g) any other steps should be taken. Furthermore, the Ombudsmen can make recommendations if they are of the opinion that the decision, recommendation, act or omission which was the subject-matter of the investigation (a) appears to have been contrary to law; or (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or (c) was based wholly or partly on a mistake of law or fact; or (d) was wrong; or (e) was pursuant to a discretionary power exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

- (2) the weight of the Ombudsmen's findings and the prestige of the office demands that recommendations be taken and acted upon;
- (3) the Ombudsmen are never seen as an advocate for either complainant or organisation.

2 *The Ombudsmen are appropriate for the private sector*

The Ombudsmen's effectiveness is ensured by three particular characteristics, which are set out in an often quoted passage by Sir George Laking:⁷⁶

- (1) Its *independence* as a Parliamentary office not responsible to the Executive Government.
- (2) Its *flexibility* in the conduct of investigations and in recommending remedies most calculated to achieve substantial justice as between the individual and the State.
- (3) Its *credibility* with the Executive Government and with the public.

These characteristics apply equally to make the Ombudsmen appropriate in the private sector.⁷⁷ First, the Ombudsmen are independent of any particular private organisation or industry. Secondly, their powers to investigate are flexible enough to accommodate the interests of both the individual and the organisation or industry. Thirdly, the status of the Ombudsmen themselves and their integrity provide credibility within organisations and industries.⁷⁸ Moreover, the Ombudsmen's modern operational ethos indicates that just as it does not stifle public decision making, it would not stifle commercial competitiveness in the private sector:⁷⁹

New Zealand Ombudsmen have broadened their approach from concentrating on the investigation and redress of complaints against the administration to *embrace the promotion of good public administration practice*. They seek to engender an attitude of positive compliance (rather than the negativity associated with fault-finding), *encouraging better systems and procedures within organisations*. Their reports and case notes comprise a body of "ombudsman law" which guides the work and attitudes of officials, *a valuable protection against future flawed*

76 Sir George Laking "The Ombudsman in Transition" (1987) 17 VUWLR 307, 311.

77 Ann Farrar "A Banking Ombudsman for New Zealand" [1992] NZLJ 320, 327.

78 This is illustrated by the fact that the Parliamentary Ombudsman from 1987-1992, Nadja Tollemache, was appointed the first Banking Ombudsman in 1992.

79 Bryan Gilling *The Ombudsman in New Zealand* (Dunmore Press, Palmerston North, 1998) 130 [emphasis added].

decision making. They have tried to be responsive to the public's needs by providing a process that is direct, informal, speedy and cheap.

The contention that the Ombudsmen are suitable for the private sector is bolstered by the fact that the ombudsman idea already exists in the private sector, in the form of voluntary, non-statutory schemes. In New Zealand there is a Banking Ombudsman and an Insurance and Savings Ombudsman. Also, the recent ministerial inquiry into the electricity industry recommended that the electricity industry establish an electricity ombudsman scheme.⁸⁰ The existence of these regimes could give rise to the argument that the statutory Ombudsmen should not be extended into the private sector, as the private sector obviously imposes checks and balances upon itself. However, leaving the private sector to impose checks and balances upon itself does not always satisfy the citizen's needs for redress. While the existing schemes are generally regarded as successful, they have some limitations, and arguably afford less protection than citizens might desire.⁸¹

For example, the Banking Ombudsman is subject to many limitations, such as not being able to look at any practice or policy of a bank which does not itself give rise to a breach of any obligation or duty owed by the bank. This seriously limits the Banking Ombudsman's role in assessing and recommending better banking practice. Other limitations include a lack of jurisdiction to look at lending or security decisions or interest rate policies. Also, no complaint can be brought that relates to an amount above \$100,000, which excludes many ordinary mortgagees. Another possible criticism of the Banking Ombudsman scheme is that the banking industry implemented the scheme out of market necessity. In other words, setting up the scheme was in the industry's own self interest.⁸² This implies that if the industry's self-interest required it to abolish the scheme it would have no qualms about doing so. This might be commercially acceptable, but it leaves consumers at the whim of arbitrary power. Finally, submission to the Banking Ombudsman is voluntary on the part of each individual bank. Therefore, one bank could opt out of the scheme, removing their clients' avenue of redress.⁸³

Other problems with current private sector ombudsmen schemes include a lack of independence from an industry or organisation so as to adequately safeguard citizens'

80 *Inquiry into the Electricity Industry: Report to the Minister of Energy* (Wellington, June 2000) 49 <<http://www.electricityinquiry.govt.nz>> (last accessed 28 August 2000).

81 Farrar, above n 77, 320.

82 Farrar, above n 77, 320, 323.

83 Currently in New Zealand all the major trading banks submit to the jurisdiction of the Banking Ombudsman through voluntary membership of the New Zealand Banking Association.

interests.⁸⁴ Another issue is that many industries choose not to implement an ombudsman scheme. For example, the telecommunications industry in New Zealand does not have a scheme, in contrast to the Australian telecommunications industry, which does have an ombudsman scheme.⁸⁵

The main point, however, is that the private sector itself has already indicated its willingness to be subject to an ombudsmen type regime. Unfortunately, potential problems with voluntary regimes mean that citizens may not receive all the protection they require, and so it is necessary to extend the statutory Ombudsmen into the private sector. Nevertheless, the benefits of self-regulation are apparent in the commercial context, as it is cheap and expertise can be incorporated into the schemes that arguably provides more commercial certainty. Therefore, if a private industry or organisation chooses to put its own ombudsman scheme in place, then there is a good argument for exempting it from the jurisdiction of the statutory Ombudsmen. Although the scheme should have to be of certain standards to ensure citizens can attain proper redress, and possibly itself be subject to the statutory Ombudsmen, who can ensure it meets required the standards.

3 Parliament has already judged the statutory Ombudsmen appropriate for the private sector

The New Zealand legislature has in fact already judged the statutory Ombudsmen appropriate for the private sector. Section 23(2) of the Protected Disclosures Act 2000 ("PDA") gives the Ombudsmen the same powers in relation to investigating disclosure of information under the PDA as the Ombudsmen have in relation to a complaint under the Ombudsmen Act 1975. This explicitly gives the Ombudsmen their first inroad into the private sector, because if an employee of a private sector company makes a disclosure under section 6 of the PDA, the Ombudsmen can investigate that disclosure.

B Filling the Gaps

Part II illustrated that the jurisdiction of the Ombudsmen does not extend to private contractors who contract with government, private clubs, societies and associations,

84 For example, some newspaper schemes in the United Kingdom have been criticised for their lack of institutional and financial independence from the industry. See P E Morris "The Banking Ombudsman Five Years On" [1992] *Lloyd's Maritime and Commercial Law Quarterly* 227, 230.

85 A current Ministerial Inquiry into Telecommunications released its draft report in June 2000, which recommended that an Electronic Communications Commissioner with regulatory powers be established. This is not an ombudsman scheme because there is no provision for the Commissioner to receive and investigate complaints. See *Ministerial Inquiry into Telecommunications: Draft Report* (Wellington, 2000) Part 4 <<http://www.teleinquiry.govt.nz/reports/draft/index.html>> (last updated 29 June 2000).

private regulatory bodies and private companies exercising public power. The overriding reason why the Ombudsmen should cover these bodies is that they exercise considerable public power, and to deny citizens recourse to their most effective complaints mechanism leaves them vulnerable to the improper use of public power. Moreover, as illustrated above, the Ombudsmen is an appropriate mechanism to apply to these bodies. In addition, each category of body carries its own particular reasons why the Ombudsmen should apply to them.

1 Private contractors who contract with government

Given that all the other mechanisms available to ensure the proper exercise of public power apply to private contractors who contract with government, at best the exclusion of the Ombudsmen is simply an oversight by a busy legislature that has not yet turned its mind to the logic of extending the Ombudsmen's jurisdiction. At worst, it represents gross inequality, and a breach of the Rule of Law.

For example, New Zealand's first privately managed and operated prison recently opened.⁸⁶ The managerial and operational actions (or inactions) of this prison are only subject to the jurisdiction of the Ombudsmen via the contract signed between the contractor and the Department of Corrections. Therefore, it is conceivable that the government could in future sign contracts that do not give the Ombudsmen jurisdiction. The Ombudsmen currently receive a significant amount of complaints from the inmates of prisons, especially in the area of human rights.⁸⁷ It is anathema to the Rule of Law, and the notion of human rights, that inmates in one prison may have less legal protection than inmates in another prison. Similarly, some local authorities have contracted out certain functions, while other local authorities continue to provide the same function. The Ombudsmen can investigate a complaint when the function is provided by a council, but not when it is provided by a contractor. The effect is to afford people different rights depending solely on where they reside.

Such inequality is unacceptable in a democratic society, and is particularly grievous because it actually denies certain sectors of the population protection from arbitrary power that others enjoy. To rectify this situation, the jurisdiction of the Ombudsmen should be immediately extended to cover private contractors who contract with government to exercise public power.

86 See above n 26.

87 Judge Anand Satyanand "The Ombudsman Concept and Human Rights Protection" (1999) 29 VUWLR 19, 23

2 *Private self-regulatory bodies*

Regulation is an inherently public power, and as such is mainly exercised by governments only. Its coercive nature requires that it is always exercised carefully, and with adequate checks to ensure that it does not unnecessarily restrict the rights of those subject to it. Citizens subject to regulation in the private sector should have accessible and effective redress against improper use of regulatory powers, which is not currently provided by the developing law of judicial review because of its cost, time delay and low success rate. Therefore, the jurisdiction of the Ombudsmen should be extended to cover private self-regulatory bodies.

3 *Private clubs, associations and societies*

Arguably, private clubs, associations and societies do not wield quite the same degree of public power as the other bodies singled out in this paper. Also, citizens usually subject themselves to the clubs, societies and associations voluntarily, which also distinguishes them from the other bodies. Nevertheless, improper use of their power can seriously disadvantage their members. This is particularly the case in New Zealand, where due to its small size, there is often only one particular club, association or society in the country, or in a particular area. Therefore, improper use of power against a member could seriously restrict the ability of that member to participate in the particular activity undertaken by the club, association or society.

Parliament recognised this fact when it passed the Judicature Amendment Act 1972 extending the scope of review to cover any power or right conferred by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate. The courts have given full effect to Parliament's intention by extending the scope of judicial review to cover private bodies performing no governmental function, but still exercising public power by affecting the rights of citizens.⁸⁸ Given judicial review's restricted usefulness, it is important that citizens should have the ability to safeguard their rights to engage in the activities of clubs, associations and societies by having recourse to the Ombudsmen.

4 *Private companies exercising public power*

Some might think it more controversial to suggest that the Ombudsmen's jurisdiction should extend to private companies that exercise public power. However, it is not really controversial in the light of the fact that private companies exercising public power are

88 *Finnigan*, above n 4; *Coleman*, above n 4.

subject to tools such as the Bill of Rights Act, and possibly judicial review. The fact that some industries have voluntarily imposed an ombudsman upon themselves also indicates the suggestion is not radical. The argument is simply that certain bodies and industries exhibit a disproportionate amount of public power over citizens, and as such citizens should have the ability to call in the Ombudsmen to adjudge any valid complaint of unreasonableness, unfairness, unjustness, oppression, discriminatory practice, or wrongdoing.

In relation to public utilities, the importance of the Ombudsmen's jurisdiction is underlined by the fact that the Ombudsmen continue to apply to SOEs, which although state owned, deliver public utilities like any private provider. The question of whether SOEs should remain subject to the Ombudsmen was answered emphatically in the affirmative by a Select Committee in 1990. A large part of the Select Committee's reasoning was based on the fact that SOEs pursue significant social and economic goals.⁸⁹ Michael Taggart justifies the Ombudsmen's jurisdiction over SOEs by noting:⁹⁰

The application of the [Ombudsman] Act to SOEs provides an independent and impartial review by the Ombudsmen of the way in which individuals and groups are affected by the day-to-day operations of a SOE... Many of the complaints over SOE activities are from consumers, who would otherwise have no real remedy.

As mentioned in Part II, when certain SOEs were privatised, the public nature of the power they exercised did not change, and yet citizens lost some of their public law protections against the improper exercise of the power. Recent examples indicate the private providers of public utilities are still liable to abuse their positions. The Road Transport Forum alleged that Tranz Rail was exploiting its market dominance by imposing predatory pricing to force competitors out of the market.⁹¹ While this particular issue might come within the jurisdiction of the Commerce Commission, it is an illustration of the power private public utility providers yield. Another recent example is the decision by TransAlta to increase its daily fixed charge from 45 cents to 75.5 cents per day, accompanied by a pricing policy that benefited large users of electricity and increased the

89 "Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee on the Review of the Effect of the Ombudsmen Act 1975 and the Official Information Act 1982 on the Operation of State Enterprises" [1990] AJHR I 22A 6-8, para 7.1-7.4.

90 "Corporatisation, Privatisation and Public Law", above n 30, 89.

91 "Ferry Pricing Unfair, Truckers Say" *The Evening Post*, Wellington, 31 July 2000, 1.

costs for domestic users.⁹² Similarly, large companies that exercise public power never exercised by the State can abuse their power to the detriment of citizens.

It is perhaps most crucial that the Ombudsmen's jurisdiction be extended to cover private companies that exercise public power. The resources that many big private companies yield, and the conglomerated power of certain industries, poses an extremely significant threat to the rights, powers, privileges and very livelihoods of many citizens. Allowing the Ombudsmen to scrutinise aspects of their business is only a small request to make when the comfort it affords to the general citizenry is so great.

C Limits to the Powers of the Ombudsmen in the Private Sector

As is the case with the Ombudsmen in the public sector, the Ombudsmen in the private sector would not exist to second guess decision makers, especially when specialist professional judgement was involved. In particular, it is not suggested that the Ombudsmen could prevent or even interfere with certain commercial decisions from being made by private companies. However, having the power to investigate and reveal reasons for the decisions might encourage private bodies wielding public power to consider their consumers, customers, clients and members more carefully, thereby averting an unfair decision. If an unfair decision is actually made, the revelations of an Ombudsmen's report may force a change in policy. This occurred in 1989 when Telecom changed the conditions in its standard contract for services following a critical report by the then Ombudsman, Nadja Tollemache.⁹³

In other words, private organisations exercising public power are asked to treat their consumers, customers, clients and members as citizens who place high personal value upon the services they provide.

VI A POSSIBLE MECHANISM FOR EXTENDING THE JURISDICTION OF THE OMBUDSMEN INTO THE PRIVATE SECTOR

If it is accepted that the Ombudsmen's jurisdiction should extend to cover private bodies exercising public power, some thought is required about the mechanism that would actually extend the jurisdiction. The mechanism needs to ensure the Ombudsmen have jurisdiction over aspects of a private organisation's activity that could be considered public power, without allowing them to encroach upon those activities that are quite clearly

92 "Thousands Quit Costly TransAlta" *The Dominion*, Wellington, 11 August 2000, 1.

93 "Corporatisation, Privatisation and Public Law", above n 30, 91; Nadja Tollemache *Report of the Ombudsmen Nadja Tollemache on an Investigation into the Standard "Contract for Telecom Services" Used by Telecom Corporation of New Zealand Limited* (Office of the Ombudsman, Wellington, 1989).

private. One possible option is to amend the Ombudsmen Act 1972 to include the following:

- (1) Provisions similar to those contained within the Official Information Act 1982 that would extend the Ombudsmen's jurisdiction to cover public power exercised by related companies of SOEs, unincorporated bodies established to assist, advise or perform any function of a public sector organisation, and any independent contractor engaged by any public sector organisation.
- (2) A provision similar to that in the Judicature Amendment Act 1972 that would allow the Ombudsmen to investigate a complaint about the exercise of power conferred by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate that affects the rights, powers and privileges of its members.
- (3) A provision similar to section 3(b) of the Bill of Rights Act 1990, allowing the Ombudsmen to investigate a complaint about an act done by any person or body in the performance of a public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

These provisions have proved effective in catching any organisation exercising public power, whether public or private. Including them in the Ombudsmen Act 1975 might help to fill the gap in the law lamented by Michael Taggart, Sir Gordon Borrie and others.⁹⁴

VII CONCLUSION

It is clear that New Zealand's state sector reforms transferred a great deal of public power into the private sector. Moreover, private bodies performing functions that were never performed by the state sector exercise considerable public power. This creates a risk for citizens, because the protection of administrative law and its public law tools to check the exercise of public power, is generally not available against decisions made in the private sector. Thus many commentators have argued that this protection should now extend over the exercise of public power in the private sector.

New Zealand responded by extending some public law tools into the private sector to help ensure that sector exercised its public power properly. Unfortunately, the jurisdiction of the statutory Ombudsmen remains restricted to the public sector. Thus citizens do not have recourse to their most accessible and effective mechanism for gaining redress against the improper use of public power. Not only does this put citizens at the mercy of private

⁹⁴ See "Corporatisation, Privatisation and Public Law", above n 30; Borrie, above n 2; Aronson, above n 31; Hunt, above n 32

sector bodies exercising public power, but it also represents inequality, inconsistency, and in many cases a breach of the Rule of Law.

It is important, therefore, that the jurisdiction of the Ombudsmen be extended to cover the exercise of public power in the private sector. This recognises the fact that consumers, clients, customers and members are in fact citizens who put very high value upon certain rights, powers and privileges. Perhaps the final word belongs to Sir Guy Powles, who in a timeless quotation captures the absolute essence of this paper – the protection of citizens and society. Upon assuming the office of Ombudsman in 1962, Sir Guy Powles said:⁹⁵

The Ombudsman is Parliament's person – put there for the protection of the individual, and if you protect the individual, you protect society. I am not looking for any scapegoats or embarking on any witch hunts. I shall look for reasons, justice, sympathy and honour, and if I don't find them, then I shall report accordingly.

95 Sir Guy Powles "The New Zealand Ombudsman – the Early Days" (1982) 12 VUWLR 207.

