ACCOUNTABILITY FOR THE EXERCISE OF 'PUBLIC' POWER: A DEFENCE OF *NEAT* DOMESTIC

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Introduction

Over the last 30 years in Australia there has been a marked increase in use by governments of private interests to pursue public goals[1]. Many government bodies have been corporatised or privatised and many government functions have been 'contracted out' to private operators. It is essential then for the proper role for administrative law in this new environment of public and private actors to be resolved.

Kirby J spoke of this in the 2003 case of *NEAT Domestic Trading Pty Limited v AWB Limited*[2] (*NEAT Domestic*). His Honour thought the case presented a 'question of principle', namely[3]:

> …whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules.

The majority judgment of McHugh, Hayne and Callinan JJ expressly refused to give a general answer to Kirby J's question, preferring to find that public law remedies were unavailable in the present case[4]. In spite of this, there is academic speculation that *NEAT Domestic* practically amounts to authority that private entities should be governed by private laws alone[5].

This essay will consider *NEAT Domestic* and its effect on the administrative law package, with particular emphasis on whether the decision is likely to lead to unaccountability for the exercise by private interests of essentially 'public' power. This essay will compare the reasoning in *NEAT Domestic* to relevant constitutional law cases; to judicial review arising at common law rather than under statute; and to academic writings in the area. Finally, specific consideration will be given to the three means by which governments outsource their functions, namely, corporatisation, privatisation and 'contracting out'.

NEAT Domestic

NEAT Domestic concerned the export of wheat from Australia as governed by the *Wheat Marketing Act* 1989 (Cth) (*the Wheat Act*), which was amended in 1998 to create an export monopoly for Australian wheat growers. The export monopoly was said to be necessary to maximise returns for Australian growers in the face of competition from heavily subsidised overseas growers[6].

Section 57 of the *Wheat Act* provides, amongst other things, that:

- wheat may only be exported with the consent of the Wheat Export Authority;

- before giving a consent, the Authority must consult with AWB (International) Limited (*AWBI*), a wholly-owned subsidiary of the Australian Wheat Board, both of which are companies limited by shares;

- the Authority must not give a consent without the prior approval in writing of AWBI;

- the *Trade Practices Act* 1974 (Cth) (the *Trade Practices Act*) does not apply to anything done by AWBI relating to the role given to it by the *Wheat Act*.

The effect of s 57 is to give AWBI the ability to veto any applications for a consent to export and thus to protect the export monopoly effected for Australian growers. Anyone wishing to export independently of the monopoly must obtain AWBI's consent.

NEAT Domestic Trading Pty Limited (*NEAT*) wished to export independently of the monopoly and made applications accordingly. It had a number of applications rejected. NEAT sought relief under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (the *ADJR Act*), arguing that AWBI's failure to consent to a licence being issued constituted an improper exercise of power as per ss 5(2)(f) and 6(2)(f) of the *ADJR Act*. That is, NEAT sought public law relief against a private body.

Taken together, the judgments in *NEAT Domestic* indicate a two-stage approach for resolving the dispute between the parties: (1) is public law applicable? And (2) if public law is applicable, has there been a breach of that law in the present case, requiring a public law remedy? The majority, comprised of McHugh, Hayne and Callinan JJ, said 'no' to the first question and did not have to consider the second[7]. Gleeson CJ answered the first question 'yes', but the second 'no'[8]. Kirby J said 'yes' on both counts[9].

In deciding whether public law was applicable, the Court had to examine s 3(1) of the *ADJR Act*. Section 3(1) provides that the ADJR Act applies where there is:

- a decision;

- of an administrative character;

- made under an enactment.

It is submitted that, despite there being three judgments with quite different conclusions, a close examination of the judgments in *NEAT Domestic* shows that their Honours adopted the same judicial reasoning. McHugh, Hayne and Callinan JJ did not, as might have been suggested[10], effectively reject the appellant's case simply because AWBI was a private entity. Their Honours – as did Gleeson CJ and Kirby J – gave consideration to s 57 of the *Wheat Act*, the nature and structure of AWBI and how the facts should be construed for the purposes of s 3(1) of the *ADJR Act*. This process of construction involves some degree of subjectivity and it is submitted that it is this element of subjectivity, not the process of reasoning itself, that accounts for the different conclusions. The three judgments will be examined in turn.

McHugh, Hayne and Callinan JJ

McHugh, Hayne and Callinan JJ nominated three factors which led their Honours to conclude that public law remedies were unavailable where AWBI fulfilled its role under the *Wheat Act*[11]:

1 the structure of s 57 and the roles given to the Wheat Export Authority and to AWBI;

2 the 'private' character of AWBI as an incorporated company for the pursuit of the objectives stated in its constitution; and

3 the incompatibility of public and private law obligations in the present case.

First, McHugh, Hayne and Callinan JJ acknowledged that s 57 gave the private corporation AWBI a public role to play[12], however their Honours were not persuaded that a decision by AWBI could be said to be the 'operative and determinative'[13] decision required or authorised by the *Wheat Act*. In McHugh, Hayne and Callinan JJ's view, the operative and determinative decision required or authorised by s 57 was the decision of the Wheat Export Authority. Their Honours said that s 57 did not 'confer statutory authority on AWBI to make the decision to give its approval or to express that decision in writing' but instead that power was 'derived from AWBI's incorporation and the applicable companies legislation'[14].

Second, the majority noted that AWBI did not owe its existence to the *Wheat Act* and had, as its chief objective, 'the pursuit of its private objectives … reference to any wider "public" considerations would be irrelevant'[15]. AWBI's constitution provided that AWBI was to be managed with the objectives, amongst others, of maximising the returns for growers selling wheat into the pool and of distributing the net return to those who have sold into the relevant pool. As such, the majority did not think that AWBI was bound to consider the interests of the appellant.

Third, and related to the majority's second argument, the majority thought that because AWBI was obliged under its constitution to protect the export monopoly any public law obligations were incompatible with AWBI's private law obligations[16]:

> [T]here is no sensible accommodation that could be made between the public and the private considerations which would have had to be taken to account if the [Wheat Act] were read as obliging AWBI to take account of public considerations.

Gleeson CJ

Gleeson CJ also looked at the character of AWBI and its role under s 57 of the *Wheat Act* in order to determine whether administrative law may be applied. Like the majority, Gleeson CJ considered AWBI's constitutional obligations[17]. But unlike the majority, Gleeson CJ was satisfied that the nature of AWBI and its role in the export monopoly as created by the *Wheat Act* made AWBI amenable to judicial review. His Honour said[18]:

> While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds … a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate.

In Gleeson CJ's view, s 57 of the *Wheat Act* operated to allow AWBI to 'deprive the Wheat Export Authority of the capacity to consent to the bulk export of wheat in a given case'[19]. However, his Honour was not satisfied that NEAT had a valid cause of action. Gleeson CJ thought it perfectly reasonable for AWBI to have had regard to the interests it represents, and to adopt a policy in accordance with its constitutional (or private law) obligations. His Honour said[20]:

> There was nothing contrary to the Act in the adoption by AWBI of a general policy; a policy which so closely reflected the legislative purpose. The complaint that the policy was administered in an unduly inflexible manner was rejected by [the primary judge] Mathews J. It is entirely theoretical, no reason having been advanced as to why the policy should have been relaxed in the case of the appellant other than that it would have been in the interests of the appellant, and its suppliers, for that to be

> done. As Mathews J found, "no material was put before AWBI which could be expected to persuade it to deviate from its policy".

It is submitted that this conclusion, although phrased differently to the third argument put by McHugh, Hayne and Callinan JJ, is essentially the same. That is, that AWBI's private law obligations outweighed any obligations which might have existed in administrative law; or, put another way, that any public law duties were discharged by AWBI having had regard to its private law duties.

Kirby J

Kirby J placed the greatest emphasis on the decision which was made, rather than the nature of the decision-maker. His Honour said the question before the Court was not whether AWBI, as the decision-maker, was a body of a particular character; the question was whether AWBI's decision was sufficiently public as to be subject to administrative law[21].

Kirby J thought s 57 of the *Wheat Act* had the effect of making AWBI's refusal to grant a consent a decision within the meaning of s 3(1) of the *ADJR Act*: after all, without s 57 any decision made by AWBI would be 'legally impotent', and a decision made by a company other than AWBI would be a 'meaningless exercise'[22]. Kirby J agreed with Gleeson CJ that AWBI represented much wider interests than the private interests of an ordinary corporation[23], and as such should be held to account by public law where AWBI exercised its powers in a manner affecting those wider interests. Further, Kirby J held there had been a breach of the *ADJR Act*. His Honour thought that such was the structure of the *Wheat Act*, Parliament intended individualised decision-making rather than a 'blanket' approach[24]: accordingly, Kirby J was prepared to grant relief to NEAT.

What is the *ratio* of *NEAT Domestic*?

There is academic disagreement about how best to interpret McHugh, Hayne and Callinan JJ's decision in *NEAT Domestic*. In Hill's view, the majority decision stands for the proposition that, although a decision is always made 'under' a Commonwealth Act when the Act is found to confer the power to make a decision, a decision is only sometimes made 'under' a Commonwealth Act when the Act gives legal consequence to the decision but does not confer legal capacity on the decision-maker[25]. Mantziaris thinks *NEAT Domestic* stands for the wider proposition that the decisions of a private entity which has a role in a scheme of public regulation are not subject to judicial review under the *ADJR Act*[26]. The late Federal Court Justice Selway thought the joint judgment[27]:

> …would seem to draw a 'bright line' distinction between bodies subject to public law and those that are not, on the basis, in part at least, of whether the body is part of the government or not.

It is submitted that Hill's is the best interpretation. Those interpretations which find in McHugh, Hayne and Callinan JJ's judgment a general statement of principle that private bodies are not subject to judicial review are, with respect, flawed in two respects: (1) the joint judgment expressly denies making such a statement of principle[28]; and (2) the argument rests on what would seem a misinterpretation of statements made in the joint judgment.

As quoted previously, McHugh, Hayne and Callinan JJ said there is no 'sensible accommodation' that could be made between AWBI's private law obligations and any potential public law obligations. As previously contended, this should be taken to mean that AWBI's private law obligations outweighed any obligations which might have existed in administrative law; or, put another way, that any public law duties were discharged by AWBI having had regard to its private law duties. The quote should also be seen in the broader context of the judgment: McHugh, Hayne and Callinan JJ had already decided that, pursuant

to s 57 of the *Wheat Act*, AWBI did not make decisions 'under an enactment' for the purposes of s 3(1) of the *ADJR Act*. As such, the judgment should *not* be seen as excluding all private corporations from judicial review – if their Honours really intended to make such an exclusion, why make an express statement to the contrary?

According to Hill's interpretation of *NEAT Domestic*, each time a private entity is given a public role, it is for the courts to determine whether the Commonwealth Act which creates that public role does so either by simply giving legal consequence to the private entity's decision (in which case administrative law is only sometimes applicable) or by conferring legal capacity on the decision-maker (in which case administrative law will always be applicable). It is submitted that Hill's interpretation is consistent with the reasoning process identified earlier from the three judgments.

Further, it is submitted that the case of *Tang v Griffith University*[29] (*Tang*) supports the above interpretation. At the time of writing, the High Court is yet to deliver judgment on an appeal which was heard on 21 June 2004[30]. However, regardless of the High Court's eventual findings in that case, both the judgment of the Queensland Court of Appeal and the transcript of the High Court proceedings show that in considering whether a decision falls within the meaning found in s 3(1) of the *ADJR Act*, courts undertake a process which is very much one of construction. In *Tang*, the relevant enactment is the *Griffith University Act* 1998 (Q)[31]. Ms Tang was excluded from a PhD candidature programme on the grounds that she had undertaken research without regard to ethical and scientific standards[32] and she argued that this exclusion was a decision of an administrative character under an enactment, and thus was subject to judicial review. The High Court's eventual findings in *Tang* are not strictly relevant to Hill's interpretation of *NEAT Domestic*; more important is the process which each member of the Court will undertake in deciding whether administrative law may be applied[33]. Arguably, that process was seen operating in each judgment in *NEAT Domestic*, and it is that process which will determine whether a given entity is governed by public law or by private law alone.

Is there a risk of unaccountability after *NEAT Domestic*?

It might be asked: if a government can give executive powers to a private body; remove any private law (such as the *Trade Practices Act*) to which that body might otherwise be held to account; and, following *NEAT Domestic*, administrative law and its remedies might not be applicable, what law *can* be applied? Would not the separation of powers doctrine, embodied in the Constitution[34], be threatened by Parliament's ability, in effect, to pursue its executive agenda away from the review of the judiciary?

Ellicott J provided a general definition of 'administrative action' in *Burns v Australian National University*[35]:

> [A]ll those decisions, neither judicial nor legislative in character, which Ministers, public servants, government agencies and others make in the exercise of statutory power conferred on them.

Ellicott J's reference to 'others' might be taken as an anticipation that there would be bodies, other than governmental ones, making decisions of an administrative character. Such bodies would include private corporations. Pearce wrote[36]:

> There will always be tension between the various arms in our system of government. But that does not mean that one arm should set out to overpower the other. … The real sufferers in this battle are the members of the public.

And Kirby and Callinan JJ said in *Gerlach v Clifton Bricks*[37]:

> No Parliament of Australia could confer absolute power on anyone … there are legal controls which it is the duty of the courts to uphold when their jurisdiction is invoked for that purpose.

Does *NEAT Domestic* create a risk that private bodies will not be held to account where they perform essentially administrative functions?

It is submitted that these fears are unfounded, because they are based on inaccurate interpretations of *NEAT Domestic*. *NEAT Domestic* should be seen as authority for *a process rather than a result*. The fact that McHugh, Hayne and Callinan JJ decided that the private corporation NEAT should not be held to account under the *ADJR Act* does not mean that their Honours will judge this way for all private corporations[38]. *NEAT Domestic* presented a task of construction for the High Court: Gleeson CJ and Kirby J were persuaded that s 57 of the *Wheat Act* envisaged a sufficiently public role for AWBI as to attract the jurisdiction of the *ADJR Act*; McHugh, Hayne and Callinan JJ were not persuaded. The High Court's judgment in *Tang*, when delivered, will no doubt involve a similar process of construction: that process was evident in the judgment of the Queensland Court of Appeal[39] and in the course of argument in the High Court[40].

In answer then to Kirby J's 'question of principle' in *NEAT Domestic*, it is submitted that *any* body (be it a private corporation or otherwise) may be held to account under the *ADJR Act* when that body, in an exercise of statutory power, has made an executive decision as per the definition found in s 3(1). In deciding whether or not there may be judicial review, the courts undertake a process of construction which might lead to different judgments (as was the case in *NEAT Domestic*), however this does not effect unaccountability. There will only be unaccountability if *NEAT Domestic* is interpreted as dictating a result rather than a process. It is submitted that such an interpretation amounts to a misunderstanding of the *ratio* of *NEAT Domestic* and as such would be an error of law.

Comparison with constitutional law cases

Although unrelated to the proper interpretation of the *ADJR Act*, it is instructive to compare the reasoning in *NEAT Domestic* with two constitutional law cases which involved private entities and public functions: *SGH Ltd v Commissioner of Taxation*[41] (*SGH*); and *Bayside City Council v Telstra*[42] (*Bayside*).

SGH

In *SGH*, a private company argued that it was a sufficiently public entity to constitute 'the State' for the purposes of s 114 of the Constitution. Section 114 provides, amongst other things, that the Commonwealth shall not impose any tax on property of any kind belonging to a State. SGH Ltd (now part of the merged Suncorp Metway entity) was a building society formed by the Queensland government in response to impending building society failures in 1976. Gleeson CJ, Gaudron, McHugh and Hayne JJ in a joint judgment, and Gummow J and Callinan J in separate judgments, found in favour of the revenue on the basis that SGH Ltd was not controlled exclusively by the State and was incorporated under the relevant legislation for private building societies[43]. Kirby J dissented on the basis that SGH Ltd was essentially a manifestation of the Queensland government[44].

As in *NEAT Domestic*, the Court had the task of characterisation to undertake in *SGH*: could SGH Ltd be considered 'the State' for the purposes of s 114 of the Constitution? In deciding this, Gleeson CJ, Gaudron, McHugh and Hayne JJ listed the following factors which might be taken into account[45]:

- the circumstances of the entity's establishment;

- the activities undertaken by the entity;
- the legal relationship between the entity and the executive government of the State; and
- any rights or powers which the executive government of the State might have over the use and disposal of the entity's property.

Gleeson CJ joined the majority in *SGH* in finding that the private corporation was not 'the State' for the purposes of s 114, however his Honour found in *NEAT Domestic* that NEAT was sufficiently public as to fall within the jurisdiction of the *ADJR Act*. One possible explanation for Gleeson CJ's different findings may be the constitutions of SGH Ltd and NEAT respectively. In *SGH*, it was found[46]:

> [T]here was no provision in the rules of SGH, or its governing statute, that it should pursue the interests of the State or the public or that its policies could be determined by the executive government.

In *NEAT Domestic*, by contrast, Gleeson CJ thought NEAT's constitution demanded that the private corporation pursue essentially 'public' interests[47].

In *SGH*, Callinan J provided a more thorough list of 'six particular aspects or attributes' which his Honour took into account in deciding whether s 114 of the Constitution applied[48]:

1 the absence or otherwise of corporators;

2 an explicit obligation of the corporation to conduct its affairs to the greatest advantage of the relevant polity;

3 the participation of the executive government in the process of formulating policy and making decisions;

4 the right or otherwise of the government to appoint directors and the source of, and responsibility for, their remuneration;

5 the destination of profits; and

6 the obligation or otherwise of the Auditor-General to audit the accounts of the corporation.

Callinan J found that only the sixth of these factors was satisfied in *SGH*; accordingly his Honour joined with the majority[49].

Again, Kirby J dissenting, was persuaded that SGH Ltd was 'the State' for the purposes of s 114. His Honour's view was consistent with his Honour's dissent in *NEAT Domestic*. Kirby J said[50]:

> [SGH Ltd] is a special building society with origins in State objectives, created for State purposes, controlled by a State manifestation, established pursuant to amended State legislation to do the business of the State and audited by the State Auditor-General under State law. … It is also connected with what I regard as the significant and relevant changes in governmental activities in recent years and the new and different instruments by which such activities are now accomplished.

Bayside

Unlike *NEAT Domestic* and *SGH*, *Bayside* is a case where the High Court gave legal consequence to the public role envisaged for private corporations by the Parliament.

In *Bayside*, the High Court held that a State law, which allowed local councils to charge Telstra and Optus fees for laying cables, was invalid under s 109 of the Constitution. Schedule 3, cl 44 of the *Telecommunications Act* 1997 (Cth) (the *Telco Act*) removes the effect of any State law which 'discriminates' against telecommunications carriers: the Court held that since Telstra and Optus were charged fees, whereas other utilities were not, there was discrimination for the purposes of the *Telco Act*, and thus s 109 of the Constitution applied[51].

One of the arguments raised against this finding was that Telstra and Optus were private corporations, and thus were beyond the legislative powers of the Commonwealth as described by the telecommunications power found in s 51(v) of the Constitution. Only Callinan J, in dissent, thought this argument should succeed: in his Honour's view, Telstra and Optus could not be considered the Commonwealth's 'agent' for the purposes of the *Telco Act*, and thus Sch 3, cl 44 of the *Telco Act* was beyond the power of the Commonwealth[52]. Callinan J thought that s 51(v) should not be read to give the Commonwealth the power to legislate for entities which were not its agents; otherwise, the Federal / State balance would be disturbed. The majority did not find the argument as persuasive[53]. In the course of argument, Kirby J remarked[54]:

> See, all of this is part of the process of turning public authorities into quasi-private authorities, and at least one arguable explanation of the federal legislation is, let us have an even playing field; let us make sure that you get even burdens which truly pass on to the users of that particular service the costs of that service.

The joint judgment of Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ traced the history of telecommunications services in Australia since Federation[55]. Initially, services were provided by the government; then by a statutory corporation; and today by publicly listed companies (including Telstra, which is majority-owned by the Commonwealth). Telecommunications carriers have roles and duties in both public and private law: as opposed to the facts in *NEAT Domestic*, the regulatory framework seen in s 3 of the *Telco Act* includes the *Trade Practices Act*. Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said the *Telco Act* established[56]:

> [A] universal service regime with the object of ensuring that all people in Australia … should have reasonable access, on an equitable basis, to standard telephone services, payphones and prescribed carriage services.

The joint judgment saw no reason to limit the scope of the telecommunications power found in s 51(v) of the Constitution[57]. Similarly, McHugh J thought it 'difficult to see' why the telecommunications power, which enabled the Commonwealth to create its own telecommunications carrier (what is now Telstra) and to protect that carrier from State laws, should not extend to protecting a private company operating as a telecommunications carrier from State laws[58].

Public / private considerations at common law

It is also instructive to compare the reasoning in *NEAT Domestic* with judicial review as arising from the common law, in particular the case of *Forbes v NSW Trotting Club Ltd*[59] (*Forbes*).

In Selway J's view, the 'joint judgment [in *NEAT Domestic*] clearly reflects a departure from some earlier cases'[60]. His Honour cited *Forbes* as an example. With respect, it is submitted that *NEAT Domestic* does not reflect – clearly or otherwise – a departure from *Forbes*. That case concerned a decision of the NSW Trotting Club Ltd (the Club) to exclude a professional punter from its premises. The Club passed the following resolution:

> That Mr Douglas Mervyn Forbes be forthwith and henceforth excluded from admission to the Harold Park Paceway and Menangle Park Paceway and any other course or courses which may now or in the future be occupied by or under the control of the New South Wales Trotting Club Limited and that Mr Douglas Mervyn Forbes be immediately informed in writing of the decision of the Committee.

The Club was a limited liability company with a public role, controlling trotting in NSW pursuant to the Rules of Trotting. The Club also owned two racecourses: the Harold Park and Menangle Park Paceways mentioned in the resolution. The Club argued that it sought to exclude the appellant in the Club's private capacity as proprietor rather than in its public capacity pursuant to the Rules of Trotting; and therefore, acting in its private capacity, the Club was entitled to exclude the appellant without affording the appellant procedural fairness[61].

The Club conceded, however, that if it were found to have excluded the appellant pursuant to the Rules of Trotting, then the exclusion would be void because the appellant would have been owed procedural fairness and none had been given[62]. The High Court held that the resolution was made by the Club in its public capacity under the Rules of Trotting. Barwick CJ, Gibbs, Stephen, Murphy and Aickin JJ all made findings one way or the other about the capacity in which the Club had acted. Barwick CJ, in dissent, thought the resolution was 'ambiguous'[63] and, having considered the NSW Trotting Club's constitution and the Rules of Trotting, concluded the resolution was made by the Club in its private capacity as proprietor[64]. Gibbs, Stephen, Murphy and Aickin JJ thought it determinative that the resolution referred to courses under the 'control' of the Club[65]. Their Honours concluded that the Club was seeking to exercise its rights under the Rules of Trotting, and as such a duty of procedural fairness was owed to the appellant.

It is submitted that the *ratio* of *Forbes* is no different to that of *NEAT Domestic*: in each case, the High Court considered the capacity in which a private entity was acting, and whether or not public law was applicable. The fact that the judicial review sought in *Forbes* was at common law, whereas that sought in *NEAT Domestic* was under the *ADJR Act*, makes little difference: it is submitted that both cases should be seen as authority for a process rather than a result.

It should be noted that in *Forbes* Gibbs and Murphy JJ went on to make wider, *obiter* statements about whether the Club may have been subject to judicial review in the event that it did not have a public role under the Rules of Trotting. Gibbs J said[66]:

> An owner who uses his [*sic*] land to conduct public race meetings owes a *moral duty* to the public from whose attendance he benefits; if he invites the public to attend for such a purpose, he should not defeat the reasonable expectation of an individual who wishes to accept the invitation by excluding him quite arbitrarily and capriciously. [*Emphasis added*.]

Murphy J agreed[67]:

> [T]he respondent exercises power which *significantly affects members of the public* … From early times, the common law has declined to regard those who conduct public utilities, such as inns, as entitled to exclude persons arbitrarily. [*Emphasis added.*]

Murphy J thought the High Court was wrong to have dealt with exclusion from a racecourse in *Cowell v Rosehill Racecourse*[68] (*Cowell*) as being concerned with private rights only[69].

Where a private body has no statutory function, judicial review is unavailable under the *ADJR Act*: s 3(1) provides that the decision must be made under an enactment. Nor would it seem from cases such as *Forbes*, *Cowell* and *NEAT Domestic* that review is available at common law[70]. The reason for this is likely that, where a private body has no statutory function, it is difficult, if not impossible, to determine the private body's public role (if any). Gibbs J's reference to the 'moral duty' of a private corporation is highly subjective and might lead to judicial activism and the associated problems which that might create for the rule of law[71]. Murphy J's reference to 'power which significantly affects members of the public' is similarly problematic: theoretically it could apply to most corporations and private bodies. An indeterminately wide net of public law would be at odds with a capitalist society's goal of minimising state control over private interests[72]. In light of the increasing use of private interests to pursue public goals, Selway J saw no reason for the courts to continue treating functions passed to the private sector as governmental 'simply because some judges still have a view of the "welfare state" which the electorate rejected decades ago'[73]. It would seem likely to place a large burden on the courts if every private body whose power affects the public was governed by administrative law; not to mention the extra constraints placed on the private interests themselves, held accountable not just by market forces and private laws, but perennially unsure of what other laws may apply to their decisions.

That is not to say there may not be judicial review of private bodies with statutory functions: as submitted earlier, *NEAT Domestic* is authority for the proposition that where a private entity is given a public role, it is for the courts to determine whether the Act does so in a manner making certain decisions amenable to judicial review. *NEAT Domestic* should not be seen as authority for the proposition that all private bodies are outside the jurisdiction of administrative law.

Academic consideration of what is 'public' and 'private'

There is a large amount of academic literature on what is often referred to as the 'public / private distinction'[74].

At the outset, it could be argued that the expression 'public / private distinction might be misleading: it could be inferred that the applicability of administrative law rests solely on a given entity's structure. But this is not the case: it is respectfully suggested that cases such as *Forbes*, *SGH*, *Bayside* and *NEAT Domestic* illustrate a process to be undertaken by the courts in determining an entity's public role[75]. That process might give regard to the given entity's structure, however the structure is not determinative[76].

Nevertheless, academic consideration of the so-called 'public / private distinction' is useful, in that it highlights the importance of ensuring that administrative law may be applied to private entities fulfilling statutory functions. If administrative law could not be applied in that way, there would likely be increased unaccountability. As Freeman points out[77]:

> Virtually every service or function we now think of as 'traditionally' public, including tax collection, fire protection, welfare provision, education and policing, has at one time or another been privately performed.

Freeman observes that 'private actors are deeply involved in regulation, service provision, policy design, and implementation'[78]. She posits a 'contract metaphor' to explain governmental interactions and processes: 'In contrast to those presenting hierarchical models of administrative law, I conceive of governance as a set of negotiated relationships'[79].

Rhode agrees: 'the state is best understood as a network of institutions with complex, sometimes competing agendas'[80]. In a critique of feminist argument based on the 'public / private distinction', Rhode wrote[81]:

> Lumping together police, welfare workers, and Pentagon officials as agents of a unitary patriarchal structure does more to obscure than to advance analysis.

It is submitted that Freeman's 'contract metaphor' sits well with the approach for determining whether administrative law may be applied as seen in *NEAT Domestic* and similar cases. A 'public / private distinction' which focuses only on the nature of the decision-maker would seem likely to lead to widespread confusion given that, as Freeman points out, governance today is more a set of negotiated relationships than a set hierarchy. In Hutchinson's view, the government 'is neither independent of private power nor completely subservient to it'[82].

Kitto J said in *Inglis v Commonwealth Trading Bank of Australia*[83] (*Inglis*):

> The decisive question is not whether the activities and functions with which the respondent is endowed are traditionally governmental in character … The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth, that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does?

This question of Kitto J, demanding as it does judicial consideration of the operation of the relevant structures and provisions, will aid in making sense of the 'contract metaphor' interpretation of government. It is submitted that Kitto J's approach is reflected in subsequent cases, including *NEAT Domestic*.

Means of government outsourcing

Specific attention should be given to the three general means by which governments fuse private with public interests and of the consequences these may have on general levels of accountability. The following are considered: (a) corporatisation; (b) privatisation; and (c) 'contracting out'.

Corporatisation

Corporatisation involves 'requiring agencies to operate more commercially' so as to make the public sector more efficient[84]: in effect it is an application of private sector principles to public sector bodies.

Corporatised public bodies often will be exposed to the accountability mechanisms of the private sector (such as competition) and as such it has been argued that 'administrative law statutes should not apply'[85]. After all, a corporatised body facing competition[86]:

> …would not possess government powers or immunities, and in relation to its commercial activities would be as susceptible to private laws as its competitors.

To the extent that corporatised bodies make commercial decisions, the traditional mechanisms of accountability in the private sphere should apply. The Federal Court has held as much: in *General Newspapers v Telstra*[87] (*General Newspapers*), Davies and Einfeld JJ, with Gummow J agreeing, held that Telstra's refusal to enter into a private contract was not a decision amenable to judicial review[88]. The Administrative Review Council argued in 1995 that the commercial activities of a Government Business Enterprise 'should be exempt from

the administrative law package'[89]. It is arguable that the reverse of this – a decision made by a corporatised body pursuant to a statutory role or function – may be amenable to judicial review[90].

Privatisation

When managing government-owned assets, governments have decided that the given asset can be run more efficiently for profit by a private body and as a result consumers will enjoy better outcomes. According to Cole[91]:

> [T]he public sector is not set up to maximise efficiency. The elaborate arrangements set up to make the public service accountable … [have] to be subordinated to other ends.

However, it is undeniable that countless privatised corporations continue to represent public interests: an example is Sydney Airport. It is submitted that the vast majority of decisions by privatised bodies should be held to account by private law alone, however, as with corporatised bodies, some scope should remain for the intervention of public law where a decision is made pursuant to a statutory role or function[92].

'Contracting out'

Contracts pose the greatest difficulty for considerations of public and private interests and associated mechanisms of accountability. On the one hand, a contract between a government agency and a private corporation has a strong avenue of accountability inherent in every contract: the parties have agreed to terms, breach of which will lead to a remedy being awarded. On the other hand – from the point of view of the 'consumer' – against whose decision will he or she seek judicial review when rights are affected adversely by a body's exercise of public power? Should it be the private corporation or the government agency? This is indicative of 'a larger concern that any move toward formal contract in regulation will amount to private deals that "oust" the public interest'[93].

One solution might be a relaxation of the privity of contract rule, which holds that only the parties to a contract are legally bound by and entitled to enforce the contract[94]. Regarding contracted-out public responsibilities, perhaps those affected by the private interest's decisions could be considered a party to the contract. The privity doctrine is in a state of development in Australia after *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[95], in which the High Court held that a corporation which was intended to be benefited by an insurance policy could recover the benefit intended for it, despite the fact that the corporation was not a party to the contract.

It is submitted that a stronger argument lies in the proposition that those affected should seek a remedy against the government agency that contracted out its responsibilities in the first place. In *General Newspapers*, Davies and Einfeld JJ said 'a decision taken under a federal enactment is an action or a refusal which, by virtue of the statute, affects legal rights and / or obligations'[96]. If a government agency contracts out its responsibilities in such a way that someone's legal rights and / or obligations are affected and the private body contracted to perform a duty fails to perform that duty, then it is submitted that the public body should be held to account. The public body may well have an action in contract against the private body, but it must ultimately be held to account for its decision to enter into the contract which affected public rights and / or obligations.

Conclusion

This essay has considered the 'question of principle' posed by Kirby J in *NEAT Domestic*, namely, whether private corporations fulfilling statutory obligations may be held to account

by administrative law or by private law only. The argument presented has shown that *NEAT Domestic* and similar cases are authority for a process rather than a result; that whenever a private entity fulfils a public role, it is for the courts to determine whether the relevant obligations and decisions merit the application of public law. It is submitted that all entities, whether private or otherwise, may be held to account under public law when Parliament has given legal consequence to an entity's decision: however it is a matter of construction for the courts to determine whether public law will be applied. Accordingly, it is submitted that *NEAT Domestic* will not lead to unaccountability for the exercise by private entities of essentially 'public' power.

Endnotes

1 Management Advisory Board, *Accountability in the Commonwealth Public Sector*, AGPS, Canberra, June 1993, p 14.
2 (2003) 198 ALR 179; [2003] HCA 35.
3 ibid at [67].
4 ibid at [49]-[50].
5 See C Mantziaris, 'A "wrong turn" on the public / private distinction' (2003) 14 *PLR* 197 at 198; B Selway, 'The public / private divide', *Administrative Law Students' Forum 2004*, University of Adelaide Law School and the Australian Institute of Administrative Law, 2004, p 1; cf, G Hill, 'The Administrative Decisions (Judicial Review) Act and "under an enactment": Can NEAT Domestic be reconciled with Glasson?' (2004) 11 *AJ Admin L* 135 at 139.
6 See para [19]-[20] of the Explanatory Memorandum to the *Wheat Marketing Legislation Amendment Act* 1998 (Cth).
7 ibid at [64].
8 ibid at [26]-[27].
9 ibid at [147].
10 See C Mantziaris, above note 5.
11 ibid at [51].
12 ibid at [49].
13 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-337 per Mason CJ.
14 ibid at [54].
15 ibid at [57].
16 ibid at [63].
17 ibid at [13].
18 ibid at [27].
19 ibid at [29].
20 ibid at [26].
21 ibid at [99] and [129].
22 ibid at [131].
23 ibid at [104].
24 ibid at [139].
25 See G Hill, above note 5.
26 See C Mantziaris, above note 5.
27 See B Selway, above note 5.
28 ibid at [49]-[50].
29 [2003] QCA 571.
30 *Griffith University v Tang* [2004] HCATrans 227. The High Court has since handed down its decision [2005] HCA (3 Mar 05) 213 ALR 274 and found that the university's decision was not susceptible to review under the *ADJR Act*.
31 Ms Tang applied for judicial review pursuant to the *Judicial Review Act* 1991 (Qld). Section 4 of that Act mirrors s 3(1) of the *ADJR Act*.
32 [2003] QCA 571 at [1] per Jerrard JA.
33 Both in the Queensland Court of Appeal's judgment and in argument in the High Court, consideration was given to how best to apply *General Newspapers v Telstra* (1993) 45 FCR 164: in that case, Telstra's decision not to enter into a contract was held not to be amenable to judicial review. In *Tang*, at issue is whether the given decision might be compared to Telstra's decision, or whether it was sufficiently 'administrative' that it ought to be reviewable.
34 *The Queen v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
35 (1982) 40 ALR 707 at 714.
36 D Pearce, 'Executive versus Judiciary' (1991) 2 *Pub L Rev* 179 at 193.
37 (2002) 209 CLR 478 at 504, quoted by Kirby J in *NEAT Domestic* ibid at [66].
38 See ibid at [49]-[50].

39 *Tang v Griffith University* above at note 29.
40 *Griffith University v Tang* above at note 30.
41 (2002) 188 ALR 241; [2002] HCA 18.
42 (2004) 206 ALR 1; [2004] HCA 19.
43 ibid at [32]-[33], [72]-[74], [149]-[150].
44 ibid at [79].
45 ibid at [16].
46 ibid at [31] per Gleeson CJ, Gaudron, McHugh and Hayne JJ.
47 ibid at [13], [27].
48 ibid at [131].
49 ibid at [148]-[150].
50 ibid at [79]-[80].
51 ibid at [44].
52 ibid at [148]-[149].
53 ibid at [29] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ; and at [96] per McHugh J.
54 [2003] HCATrans 382.
55 ibid at [6].
56 ibid at [9].
57 ibid at [29].
58 ibid at [96].
59 (1979) 143 CLR 242.
60 B Selway, above at note 5.
61 See *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 (*Heatley*) at 506, 511.
62 (1979) 143 CLR 242 at 248 per Barwick CJ. That concession was thought by Barwick CJ to be consistent with the High Court's decision in *Heatley*.
63 ibid at 248.
64 ibid at 258.
65 ibid at 266 per Gibbs J; at 274 per Murphy J; and at 278 per Aickin J, with Stephen J agreeing.
66 ibid at 268-269.
67 ibid at 274.
68 (1937) 56 CLR 605.
69 *Forbes* at 274-275.
70 Cf, comments of Murphy J in *Forbes* (1979) 143 CLR 242 at 275; and Kirby J in *NEAT Domestic* [2003] HCA 35 at [110]-[111].
71 See D Heydon, 'Judicial Activism and the Death of the Rule of Law', *Quadrant*, Jan-Feb 2003.
72 M Friedman, 'The Role of Government in a Free Society', Chapter II, *Capitalism and Freedom*, Chicago, University of Chicago Press, 1982, p 22.
73 B Selway, see above note 5 at 2.
74 See, for example, M Allars, *Administrative Law: Cases and Commentary*, Butterworths, Sydney, 1997, p 49.
75 See also *General Newspapers v Telstra* (1993) 45 FCR 164.
76 See, for example, the criteria considered in *SGH* above note 41 at [49].
77 J Freeman, 'The private role in public governance' (2000) 75 *N Y U L Rev* 543 at 552-553.
78 ibid at 551.
79 ibid at 571.
80 D Rhode, 'Feminism and the State' (1994) 107 *Harv L Rev*1181 at 1185.
81 ibid at 1186.
82 A Hutchinson, 'Mice under a chair: Democracy, Courts in the Administrative State' (1990) 40 *University of Toronto L Jo* 374 at 397.
83 (1969) 119 CLR 334 at 337-338, quoted by Callinan J in *SGH*, [2002] HCA 18 at [128].
84 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38, 1995 at [4.2].
85 Ibid [4.2], [4.14], [4.24].
86 Ibid at [83] [4.16].
87 (1993) 45 FCR 164.
88 ibid at [14].
89 Op cit note 84 at [4.20].
90 As per the *ratio* of *NEAT Domestic* above at note 2.
91 R Cole, 'The public sector: The conflict between accountability and efficiency' (1988) 47 *Aust Jo of Pub Admin* 223 at 225.
92 As per the *ratio* of *NEAT Domestic*.
93 See J Freeman, above note 77 at 669.
94 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 853 per Viscount Haldane LC.
95 (1988) 165 CLR 107.
96 (1993) 45 FCR 164 at [14], with Gummow J agreeing.