JUDICIAL REVIEW OF DECISIONS BY PRIVATE BODIES

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Introduction

It has been said that '(t)he primary purpose of administrative law ... is to keep the powers of government within their legal bounds'.[1] In engaging in judicial review, the courts have historically viewed their role in terms of the declaration and enforcement of the law which determines the limits and governs the exercise of public power.[2] Accordingly, judicial review has traditionally been concerned with the 'enforcement of the rule of law over executive action'.[3]

However, as government functions are increasingly outsourced to private bodies, a question arises as to whether, and on what basis, 'private'[4] bodies can be subject to judicial review. The Australian courts have not yet given a definitive answer to this question. In the recent High Court decision of *NEAT Domestic Trading Pty Ltd v AWB Ltd*[5] (*NEAT*), three members of the Court (McHugh, Hayne and Callinan JJ) indicated that the private nature of a body is a factor counting against its being subject to judicial review,[6] but refrained from answering the general question of when public law remedies may be granted against private bodies.

Anglo-Australian courts have traditionally focussed on the *source* of a body's power to determine whether the exercise of that power is subject to judicial review: power sourced from statute will be subject to public law constraints enforceable by way of judicial review, whereas contractual power is not so limited. Each of the judges in *NEAT* largely followed this approach, with the Court dividing on the question of whether the relevant private body was exercising 'statutory power' or, in the language of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), whether it made a 'decision of an administrative character ... under an enactment'.

In cases where the source of the relevant power is neither statutory nor contractual, the English courts have looked to the *nature* of the power in order to determine whether private bodies are subject to judicial review. Where the power can properly be characterised as 'public' in nature, judicial review may be available.

Apart from a few early exceptions,[7] Australian courts are yet to embrace this 'public power' test. *NEAT* recently presented the High Court with the opportunity to give some indication as to whether Australian courts would follow the English lead in this area, but that opportunity was passed up by all members of the Court except Kirby J, who gave limited consideration to the issue.

This paper presents an overview of these two bases on which the courts have found that judicial review of private bodies may be available - namely, where there has been an exercise of *statutory power* on the one hand (see **Part B**), and where there has been an

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exercise of *public power* on the other (**Part C**), and discusses the extent to which Australian courts have been willing to use 'public power' as a criterion for determining whether a body is subject to judicial review.

Although the High Court in *NEAT* did not indicate when (if ever) the exercise of non-statutory powers by private bodies will be subject to judicial review, there are some indications in *NEAT*, as well as in the English case law, as to when the exercise of such powers will *not* be subject to review. These factors are considered in **Part D**.

Finally, we consider a third basis, often overlooked, on which the exercise of power by private bodies can be limited by public law constraints. Although Anglo-Australian courts have typically held that the exercise of contractual power is not subject to judicial review, there is an existing body of law under which contractual power exercised by 'domestic tribunals' and certain other bodies may be reviewed in private law actions on grounds that are, in many respects, analogous to the common law grounds of judicial review. **Part E** presents a brief overview of this body of law.

When does a private body exercise statutory power?

The conferral of a specific power by statute on a public body carries with it public law limitations as required by the Constitution[8] and as implied as a matter of common law or statutory interpretation. The same should be true of statutory power conferred on private bodies.[9] However, following *NEAT*, it seems that a different standard applies in determining whether a statute confers power on a private body as opposed to a public body.[10]

Accordingly, there may be some difficulty in identifying when a power exercised by a private body is statutory. This difficulty is highlighted by the decision in *NEAT* itself, where the High Court split 3:2 as to whether review, either at common law or under the ADJR Act, was available against AWB (International) Ltd (AWBI), a private company that was given a role under a statutory scheme regulating the export of wheat.[11] The Court delivered three separate judgments, each of which took a different approach to the question of review based largely on the statutory context in which AWBI operated. It is helpful to briefly run through that context before considering the judgments.

The decision in* NEAT - *what did AWBI do?

The *Wheat Marketing Act 1989* (Cth) (the Wheat Act) prohibited the export of wheat without the consent of the Wheat Export Authority, a statutory authority established by the Wheat Act. In turn, the Wheat Authority could not give its consent without the prior approval of AWBI.

AWBI was a wheat grower-owned company limited by shares and incorporated under the Corporations Law of Victoria. Under its constitution, the business of AWBI was to be conducted in the interests of maximising returns to growers.

The Wheat Act did not lay down any procedure to be followed by AWBI in giving or refusing its approval, or any considerations that AWBI was required to take into account. Furthermore, the *Trade Practices Act 1974* did not apply to 'anything done' by AWBI under the relevant sections of the Wheat Act. AWBI was not required to obtain the Wheat Authority's consent in order to export wheat.

NEAT Domestic Trading Pty Ltd (NEAT Domestic) had applied to the Wheat Authority for its consent to the export of a bulk shipment of wheat. The Authority refused the application because AWBI did not give its approval. NEAT Domestic sought review of AWBI's withholding of approval on the basis that AWBI was acting in accordance with a rule or policy

without regard to the merits of the particular application. This required first establishing that AWBI was subject to judicial review either on the basis that it made a 'decision of an administrative character ... under an enactment' for the purposes of the ADJR Act, or because it was subject to common law judicial review. The Federal Court dismissed the application by NEAT Domestic at both first instance and on appeal.

On appeal, the High Court split as follows:

- A majority of the Court (McHugh, Hayne and Callinan JJ) in a joint judgment held that public law remedies did not lie against AWBI, either pursuant to the ADJR Act or, it seems, at common law.

- Gleeson CJ held that, if the decision was reviewable under the ADJR Act (which he thought it was), AWBI had not breached the relevant ground of review. Gleeson CJ did not consider common law judicial review.

- Kirby J held both that the decision was reviewable under the ADJR Act and that the ground of review invoked by NEAT Domestic was made out. Like Gleeson CJ, Kirby J did not consider the availability of judicial review at common law, except to note that different, although related, questions may arise in that context.

Why did the joint judges find that public law remedies were not available?

The joint judges gave three reasons why AWBI was not subject to judicial review in performing the role it did under the Act. The first was the statutory context, which was sufficient for their Honours to conclude that the Wheat Act did not confer statutory authority on AWBI and that AWBI did not make a 'decision under an enactment' for the purposes of the ADJR Act. The other two reasons were the private nature of AWBI and the incompatibility of any public law obligations with AWBI's existing private obligations. These two considerations are discussed further in Part C below.

In relation to the first reason, three factors appeared to be relevant to the joint judges' conclusion that AWBI was not exercising a statutory power and did not make a decision under an enactment.[12]

First, the legislation already conferred statutory power on the Wheat Authority to consent to the export of wheat.

Second, the Wheat Authority derived its functions and powers entirely from the Wheat Act. The power to consent to the export of wheat was conditional on approval from AWBI. Thus AWBI's determination was characterised as only a condition precedent to the lawful exercise of power by the Wheat Authority (the latter being the relevant 'operative and determinative' decision[13]).

Third, unlike the Wheat Authority, AWBI did not need a specific statutory power to give it capacity to provide an approval in writing - as a company it already had power to make a decision and to express that decision in writing.

This analysis arguably proceeded on the assumption that only one exercise of power could be subject to review. In this the joint judges were clearly influenced by the line of ADJR Act cases that distinguish between a preliminary decision (which will usually not be subject to review) and an operative and determinative decision (which will usually be subject to review). The joint judges did not, however, expressly address whether this was a case where the statute specifically authorised an interim decision, which is a recognised exception to the general rule that only 'final' decisions are reviewable under the ADJR Act.[14]

On the joint judges' approach, it was 'neither necessary *nor appropriate*'[15] to read the Act as impliedly conferring statutory power on AWBI. It was not necessary because, unlike the Wheat Authority, AWBI was not a creature of statute and already had power to create written documents; it was not appropriate because the majority had already concluded that the Wheat Authority made the relevant 'operative decision' for the purposes of the ADJR Act.

In this way, the joint judges both decided that AWBI was not subject to review under the ADJR Act because it did not make the operative and determinative decision, and eliminated one of the bases on which AWBI could be subject to judicial review at common law, namely, that AWBI was exercising statutory power.[16] In doing so, the joint judges drew a sharp line between the Wheat Authority, a statutory body that exercised statutory power, and AWBI, a private body that exercised private power.

This distinction would also seem to indicate that few statutes will ever be construed as conferring statutory power on a private body. This is because private bodies such as companies and natural persons normally already have the capacity to do things (such as make decisions) which, if done by public bodies for the purposes of a statutory scheme, would require statutory authority. It may be, however, that in the absence of a public body such as the Wheat Authority from the statutory scheme, the Court would have been more willing to find that the Wheat Act did confer power on AWBI.

What did Gleeson CJ and Kirby J say?

In contrast to the majority, both Gleeson CJ and Kirby J looked more broadly at the effect given to AWBI's actions by the Wheat Act, and did not draw such a sharp distinction between AWBI and the Wheat Authority. So, for example, Gleeson CJ noted that what AWBI did was:

> ... in substance, the exercise of a statutory power to deprive the Wheat Export Authority of the capacity to consent to the bulk export of wheat in a given case.[17]

Similarly, Kirby J concluded that AWBI had made a decision of an administrative character under an enactment. In doing so, Kirby J focussed less on whether AWBI's power derived from the Wheat Act, and more on whether there was an appropriate nexus between that power and the Wheat Act. He concluded there was such a nexus, including because:

> ... AWBI had conferred upon it the power to exercise a key influence on the regulatory process and the conduct of a public authority. ... It follows that it is the [Wheat] Act that provides for, requires, and gives legal force to, AWBI's "decisions" relevant to NEAT's applications.[18]

Will it be sufficient if the powers are exercised in a statutory context?

Even though the majority in *NEAT* concluded that AWBI did not exercise statutory power, it is clear that AWBI was exercising power in a statutory context. Whether this provided a sufficient basis on which to subject AWBI to common law judicial review was not explicitly considered by the joint judges.

There are, however, several decisions of State Supreme Courts that have subjected private bodies to judicial review on the basis of the legislative context in which they operate. In particular, there is a line of cases where the internal decisions of registered political parties have been subjected to judicial review, on the basis that such parties are recognised by, and registered under, the *Commonwealth Electoral Act 1918*.[19] Review has usually been sought on the basis that the particular party has acted *ultra vires* in breach of party rules. The effect of these decisions has thus been to give substantive legal effect to those party rules, even though the rules are neither legislative nor contractual. This is a consequence the courts have not explicitly recognised.

The basis on which courts have reviewed these decisions has not been persuasively articulated. It may be that the fact that the relevant power is exercised in a statutory context indicates that a private body is exercising 'public power', and that the exercise of public power is subject to judicial review. This is discussed in the following section.

Is the exercise of 'public power' subject to judicial review?

The Datafin principle - is the body exercising 'public power'?

The English courts similarly accept that judicial review will be available against a private body where the source of the relevant power is statutory. However, they have also recognised an alternative basis on which private bodies may be subject to judicial review, namely, where the body is exercising 'public power'. The key authority in this area is the decision of the Court of Appeal in *R v Panel on Take-Overs and Mergers; Ex parte Datafin*[20] (*Datafin*).

In *Datafin*, review was sought of a decision of the Panel on Take-overs and Mergers. The Panel was a non-statutory, unincorporated association with some government representation within its membership. It had no statutory, prerogative or common law powers and was not in a contractual relationship with the financial market or with those who deal in that market.

One of the key functions of the Panel was to administer the City Code on Take-overs and Mergers. Although the Panel had no power to enforce the Code, a decision by the Panel that there had been a material breach of the Code could result in the imposition of various statutory sanctions and penalties, including the exclusion or suspension of a listed company from the stock exchange.

In considering whether decisions of the Panel were amenable to judicial review, the Court rejected the submission that the source of a body's power is the sole test for determining amenability to judicial review. In this respect, Lloyd LJ noted as follows:[21]

> Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review ... But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Mr. Lever submitted, be sufficient to bring the body within the reach of judicial review.

The Court noted that there were a number of features of the Panel and its decisions that indicated that it was effectively exercising 'public power'. In particular, it was clear that the Panel performed an integral role in the government's regulation of the financial markets[22] and made decisions that had a significant effect on a number of persons, many of whom had not consented to its exercise of power.[23] Accordingly, the Panel operated as 'an integral part of a system which has a public law character', was 'supported by public law in that public law sanctions are applied if its edicts are ignored' and performed 'public law functions'.[24]

Has Datafin been applied in Australia?

Typing Centre of New South Wales v Toose

While Australian courts have on occasion referred to *Datafin* with apparent approval,[25] the decision appears to have only been directly applied once, in *Typing Centre of New South Wales v Toose*[26] (*Toose*).

In *Toose*, review was sought of a decision of the Advertising Standards Council (the ASC). The ASC played a key role in the system of self-regulation adopted by the advertising industry. One of its main functions was to receive and determine complaints of breaches of advertising standards promulgated by the Media Council. Most of the proprietors of commercial media in Australia were members of the Media Council, which was in turn a party to the charter that established the ASC. The Media Council could impose sanctions upon the relevant advertising agency where the ASC had found that an advertiser had breached the advertising standards. In addition, no media proprietor would accept an advertisement for publication following such a finding by the ASC.

The relevant decision under challenge in *Toose* was a finding by the ASC that an advertisement published by the plaintiff was incorrect and misleading in contravention of the Advertising Code of Ethics. The plaintiff sought review of the ASC's decision on the basis that the ASC had failed to observe the requirements of natural justice.

In considering whether the ASC was subject to judicial review, Mathews J referred to the reasoning in *Datafin*, noting that 'the real issue is whether it is exercising public functions, or functions which have public law consequences, or, as Lord Donaldson would have it, whether there is a public element in its functions'.[27] Mathews J concluded that the ASC was exercising a 'public function', and could therefore be subject to judicial review in appropriate circumstances. [28] In this respect, her Honour noted that the ASC had power to interpret the various advertising codes in precisely the same way as the courts can interpret Acts of Parliament. Similarly, it provided an alternative forum for dealing with matters which might otherwise need to be litigated in the courts. In addition, its jurisdiction was attracted simply by means of the publication of a single media advertisement.

The decision in *Toose* was referred to with approval in *Dorf Industries Pty Ltd v Toose*.[29] In an *obiter* statement in that case, Ryan J expressly agreed with Mathews J that decisions of the ASC were amenable to judicial review.[30]

What has the High Court said about public power?

NEAT presented the High Court with the opportunity to expressly adopt or reject 'public power' as a criterion for determining the availability of judicial review. This issue was not, however, explicitly addressed by the majority, and rated only a brief mention by Kirby J.[31]

Long before *NEAT*, and even before *Datafin*, Murphy J had employed the language of 'public power' in *Forbes v New South Wales Trotting Club Ltd*.[32] That case concerned the obligations of a private trotting club to accord procedural fairness before exercising the power to warn off persons from courses under its control. The club had conceded that it was obliged to provide procedural fairness prior to making such a decision.[33] In finding that the applicant in that case was entitled to the relief sought, Murphy J made the following observation:[34]

> There is a difference between public and private power but ... one may shade into the other. When rights are exercised directly by the government or by some agency or body vested with statutory authority, public power is obviously being exercised, but it may be exercised in ways which are not so obvious ... [A] body ... which conducts a public racecourse at which betting is permitted under statutory authority, to which it admits members of the public on a payment of a fee, is exercising public power.

This passage was cited with apparent approval by Kirby J in *NEAT*. [35] However, his Honour made it clear that he was not expressing any view as to 'whether or not the criterion of the exercise of "public power" is sufficiently precise to be accepted as the basis for review of decisions under the common law',[36] notwithstanding his conclusion that 'the observations

about the nature of public power identified in cases such as *Forbes* and *Datafin* are helpful in analysing whether particular decisions are of an "administrative character"'.[37]

While the majority in *NEAT* did not consider whether AWBI was exercising 'public power', the joint judges considered that the 'private' character of AWBI as a company incorporated under companies legislation for the pursuit of maximising returns to wheat growers, and the difficulty in reconciling the pursuit of these 'private interests' with public law obligations, were key reasons why judicial review was not available against AWBI. We outline these considerations, as well as two other factors that may be relevant to determining when judicial review will be available against a private body, in the following Part.

When will judicial review not be available?

Although in *NEAT* the High Court did not expressly consider any basis on which a private body exercising non-statutory powers *will* be subject to judicial review, it is possible to derive from the various judgments certain factors that may indicate when judicial review will *not* be available. These factors are:

- compatibility with public law obligations;
- whether alternative bodies are subject to review; and
- whether there are alternative avenues of review.

The third factor has also been considered by the English courts.

Are public law obligations incompatible with a body's private obligations?

One of the reasons for the joint judges' finding in *NEAT* that AWBI was not subject to judicial review at common law was that the public law obligations sought to be imposed on AWBI were incompatible with AWBI's private interests. This was because:

- the 'private' considerations AWBI could take into account included seeking to maximise returns by remaining the sole bulk exporter of wheat; and

- this consideration (according to the joint judges) outweighed any countervailing public considerations that could be derived from the legislation.

It followed for the joint judges that no sensible accommodation could be made between AWBI's private considerations and any public considerations, and thus that AWBI could apply a blanket policy without regard to the merits of an individual application. Interestingly, the joint judges did not explain why AWBI's private considerations would necessarily outweigh any countervailing public consideration; indeed there was no express consideration of what those countervailing considerations might be.

In our view, the majority went too far in excluding *all* judicial review on this basis. Even accepting the majority's conclusion that AWBI could not be required to consider the merits of a particular application, it would have been possible to confine the more general conclusion that judicial review was not available to the particular ground of review sought to be invoked in that case. This is analogous to the question of the justiciability of non-statutory executive action in judicial review proceedings, which is ordinarily answered by reference to the grounds of review on which the application relies.[38]

In this regard, it is worth noting that English courts have often found it difficult to subject private bodies to any ground of review other than breach of procedural fairness. This has not stopped the courts from subjecting private bodies to judicial review and, in recognition of

this, Lord Donaldson has suggested fashioning an 'innominate' ground of review for such bodies.[39]

Are there alternative bodies to review?

Although not necessarily forming an explicit part of the courts' reasoning in decisions regarding judicial review of private bodies, it appears that the availability of other means of challenging an exercise of power has influenced the courts' consideration of whether judicial review is available. Two alternatives are considered below.

First, it may be that the decisions of other bodies in the relevant scheme can be challenged. So, for example, in *NEAT* the decision-making process involved two bodies - AWBI and the Wheat Authority. Although not explicitly relied upon by the joint judges as a separate factor, the existence of the Wheat Authority, its role in the scheme and its amenability to judicial review appear to have been factors that shaped the conclusion of the joint judges that AWBI was not subject to judicial review.[40] This is in contrast to Kirby J, who appeared to consider that the fact that the decisions of the Wheat Authority were 'administrative' for ADJR Act purposes only strengthened the conclusion that the decisions of AWBI should be similarly characterised.[41]

Are there alternative avenues of review?

Second, there may be other avenues by which the particular exercise of power can be challenged. The availability of other avenues has on occasion led English courts to refuse judicial review of decisions of private bodies; conversely the absence of alternative avenues of redress has been a factor in subjecting bodies to judicial review.[42] So, for example, in *R v Jockey Club Disciplinary Committee; Ex parte Aga Khan*,[43] the Court of Appeal found that a decision of the Jockey Club was not subject to judicial review on the application of a member with whom it had a contractual arrangement. However, the Court left open the question of whether judicial review could be sought by a person with no contractual relationship to the Club.[44]

In *NEAT*, the decisions of AWBI were immune from challenge under the *Trade Practices Act 1974*. This may have been a factor influencing Kirby J's conclusion that AWBI was subject to ADJR Act review.[45] This was not, however, a factor explicitly considered by the majority in *NEAT*.

Accordingly, the fact that the person seeking review is in a contractual relationship with the relevant body may indicate that judicial review will not be available. However, while judicial review may not be available, the courts have recognised that private bodies may nevertheless be subject to public law-like obligations enforceable in a private law action. We briefly consider this form of review in the following Part.

Are contractual powers ever subject tO public law constraints? (the 'club' cases)

At the outset we noted the description of administrative law as being concerned with the powers of government. Accordingly, it has been said that the common law of judicial review focuses on the control of government power and that, where the source of the power being exercised is purely consensual or contractual, judicial review will not be available. The discussion so far has thus considered when the exercise of power by private bodies may be subject to *public law* judicial review. However, it is relevant to note that the activities of private bodies may also be reviewed in a *private law* action on grounds that are, in many respects, analogous to the common law grounds of review.[46]

In this final section we briefly consider this form of private law review with reference to the 'club cases'. These cases deal with private dispute resolution bodies often found within clubs or associations, which are sometimes referred to as 'domestic tribunals'.

There are several differences, both procedural and remedial, between this form of review and public law judicial review:

- The relevant cause of action is different to traditional judicial review, usually being framed as an action for breach of contract or breach of trust, or potentially for unlawful restraint of trade, rather than an application for orders in the nature of prerogative relief, or relief under judicial review legislation. [47]

- It follows that the remedies available also differ: prerogative relief is unavailable and, instead, the usual relief is a declaration, often coupled with an injunction. Damages may also be available.

- The standing of a person to bring an action may also vary. So, for example, where the action is based on breach of contract, it is necessary for the person bringing the action to establish a contractual relationship with the domestic tribunal, or perhaps a beneficial interest in the contractual right sought to be enforced.[48]

However, whilst the form of action differs, the grounds on which such 'review' is conducted largely mirror the public law grounds on which judicial review is conducted. Furthermore, the reasoning in such cases often mirrors, either explicitly or implicitly, that adopted in judicial review cases.[49]

Defining judicial review purely in terms of governmental power or prerogative relief thus risks ignoring this particular area of law concerning public law-type constraints on the exercise of power. Indeed, it may be, as Spigelman CJ has suggested, that:

> what the future holds is the emergence of general principles of "institutional law", rather than parallel principles in each of administrative law, corporations law, trade union law and the law of associations.[50]

Conclusion

As the discussion above demonstrates, the extent to which decisions of private bodies may be subject to judicial review is an issue that has not yet been settled in Australia. The recent High Court decision in *NEAT* leaves a number of unresolved questions. For example, when will a private body be taken to be exercising statutory power? To what extent will the statutory context in which a body operates be a relevant consideration in determining the availability of judicial review? Is the 'private character' of the body a relevant consideration? To what extent, if at all, will the 'public power' test developed by the English courts be accepted as the basis for review of decisions under the common law? As governments continue to adopt alternative means of delivering services traditionally performed by the executive, it is likely that the Court will again be called upon to consider these issues at some stage in the future.

Endnotes

1 HWR Wade and CF Forsyth, *Administrative Law* (7th ed, 1994), p 5.
2 See, for example, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35 - 36 per Brennan J.
3 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70 per Brennan J.
4 We use 'private' here to mean bodies that are not generally considered to be part of government, for example, bodies that are not the Commonwealth or an officer of the Commonwealth for constitutional purposes, and similarly not a State or an officer of a State.

5 (2003) 198 ALR 179.
6 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [51], [57]-[63].
7 Most notably *Typing Centre of New South Wales v Toose* (unreported, NSW Supreme Court, 15/12/1988), discussed further below.
8 See, for example, *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [102] per Gaudron, McHugh Gummow, Kirby and Hayne JJ (legislation purporting to confer a totally open-ended discretion 'would appear to lack the hallmark of the exercise of legislative power'). See also *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [70] per Kirby and Callinan JJ (cited in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [66] per Kirby J). But compare the approach of Gleeson CJ in *NEAT*, where his Honour appears to assume that there may be some powers conferred by statute that can be exercised without regard to any particular considerations (see *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [11]).
9 See, for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [66]-[68], [133] per Kirby J; cf Gleeson CJ at [11].
10 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [54] per McHugh, Hayne and Callinan JJ.
11 In contrast to the outcome in *NEAT*, there are several examples of State courts judicially reviewing the power exercised by private bodies on the basis that the power is statutory. These include decisions of officials in privately run prisons (eg *Stewart v Crowley* [2002] VSCA 201; *Henderson v Beltracchi* [1999] VSC 135 - no issue appears to have been taken in these cases regarding the private nature of the decision-makers); and the exercise of disciplinary power by the Queensland Turf Club (*R v Wadley, Ex parte Burton* [1976] Qd R 286). For an early High Court case in relation to the exercise of legislative-type power in relation to church property by the NSW Synod of the Church of England see *Fielding v Houison* (1909) 8 CLR 673 at 439 per Isaacs J.
12 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [52]-[55].
13 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 336-7 per Mason CJ.
14 See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ.
15 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [54], emphasis added.
16 The approach of the joint judges in *NEAT* illustrates the potential for overlap between jurisdictional considerations and the scope of judicial review. At the very least, it is often the case that questions as to a court's jurisdiction and the limits (if any) on the exercise of a particular power will overlap. For example, where a body's power is alleged to be constrained because the power is conferred by statute, the question as to the existence of any such constraint will usually be answered in the same way, and having regard to the same factors, as the question whether the Federal Court (for example) has jurisdiction pursuant to the ADJR Act or s.39B(1A)(c) of the *Judiciary Act 1903* (ie whether there is a decision under an enactment or the matter arises under a law made by the Parliament). The joint judges in *NEAT* went even further. In particular, the joint judges referred to ADJR Act case law in holding that the exercise of power by AWBI was not subject to public law remedies either pursuant to the ADJR Act or at common law.
17 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [29].
18 See *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [119] and [121] -[123].
19 The line of cases begins with the decision of the Supreme Court (Dowsett J) in *Baldwin v Everingham* [1993] 1 QdR 10 regarding the Queensland Division of the Liberal Party. It has been followed on numerous occasions: *Galt v Flegg* [2003] QSC 290; *Tucker v Macdonald* [2001] QSC 296 (both cases dealing with the preselection of Liberal Party candidate); *Clarke v Australian Labour Party (SA Branch)* (1999) 74 SASR 109 ('stacking' of ALP branches); *Thornley v Heffernan* (unreported, NSW Supreme Court, Brownie J, 25 July 1995) (cancellation of endorsement as Liberal Party candidate). See also *Sharples v O'Shea* (unreported, Qld Supreme Court, Atkinson J, 18 August 1999) and *Liddle v Central Australian Aboriginal Legal Aid Service Inc* (1999) 150 FLR 142. These cases have all sought to distinguish the earlier decision of the High Court in *Cameron v Hogan* (1934) 51 CLR 358. See also, in relation to judicial review of Church decisions, *Scandrett v Dowling* (1992) 27 NSWLR 485 per Priestley JA (Hope AJA agreeing); cf *Macqueen v Frackelton* (1909) 8 CLR 673. These authorities are considered in S Gorman, 'Legislative Recognition of Churches and the Implications for Judicial Review' (2002) 9 *Aust Jo of Admin Law* 84.
20 [1987] 1 QB 815.
21 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 847.
22 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 838 per Lord Donaldson.
23 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 838 per Lord Donaldson.
24 *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 836 per Lord Donaldson.
25 See, for example, *Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121 at 137 per Tadgell J and 154, 160 - 161 and 163 per Eames J; *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 385 per Spigelman CJ; *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at [81] per Campbell J.
26 Unreported, NSW Supreme Court, 15/12/1988.
27 *Typing Centre of New South Wales v Toose* (unreported, NSW Supreme Court, 15/12/1988 at 19).
28 *Typing Centre of New South Wales v Toose* (unreported, NSW Supreme Court, 15/12/1988 at 20).
29 (1994) 127 ALR 654.
30 *Dorf Industries Pty Ltd v Toose* (1994) 127 ALR 654 at 667.
31 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [111] - [115].

32 (1979) 143 CLR 242.
33 Gibbs J noted that this concession was 'correctly made': *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 264.
34 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 275.
35 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [111].
36 In this respect, Kirby J referred to P Craig 'Public Law and Control over Private Power' in M Taggart (ed) *The Province of Administrative Law* (1997) 196 at 198 - 9. Other commentators have questioned the usefulness of a test based on an amorphous concept of 'public power': see, for example, M Aronson and B Dyer *Judicial Review of Administrative Action* (2nd ed, 2000) at 100; A Mason 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) 31 *AIAL Forum* 45 at 59; see also the commentaries referred to by Chief Justice Spigelman in 'Foundations of Administrative Law'(1999) 4 *The Judicial Review* 69 at 75.
37 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [115].
38 See, for example, *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164. But compare Kirby J in *NEAT*, where his Honour rejected the suggestion by Gyles J in the Federal Court that AWBI decisions could be taken 'under an enactment' in some circumstances but not others (see *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [128]).
39 *R v Panel on Takeovers and Mergers; Ex parte Guinness Plc* [1990] 1 QB 146, at 159-160; see also Woolf LJ at 193-4.
40 See, for example, the joint judgement in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [52] ('It is the authority's decision to give its consent which is the operative and determinative decision which the 1989 Act requires or authorises'), [55] (AWB's decision was a condition precedent to exercise of power by Authority) [59] (the Wheat Act should not be read as 'shifting' to AWB the obligation to take account of matters of the kind which the Authority should take account of).
41 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [107], [108].
42 See for example *R v Panel on Take-Overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 at 838 per Donaldson LJ.
43 [1993] 1 WLR 909.
44 See *R v Jockey Club Disciplinary Committee; Ex parte Aga Khan* [1993] 1 WLR 909 at 924 per Bingham MR and 930 per Farquharson LJ. See also *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at [113] per Campbell J.
45 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179 at [105]; see also at [124]-[125]. Gleeson CJ also referred to the exclusion of the TPA at [27].
46 For an early example see *Dickason v Edwards* (1910) 10 CLR 243.
47 There have been some suggestions that an independent cause of action may exist in relation to domestic tribunals, although these suggestions have been made in a context where it was unnecessary to decide the point, there being a cause of action for breach of contract clearly available. See, for example, *Dixon v Australian Society of Accountants* (1989) 95 FLR 231 at 236 (Miles CJ); see also *Australian Football League v Carlton Football Club* [1998] 2 VR 546 at 550 per Tadgell JA ('I believe that there is no decision of a private or domestic tribunal with which the courts will refuse to interfere if interference be considered necessary for the attainment of justice.').
48 For example, by analogy with the reasoning in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.
49 For example, as with the debate in relation to the jurisprudential basis of judicial review, there is some divergence in the club cases as to whether the existence of the relevant limitations on power (ie, the grounds of review) derive from ordinary principles relating to the implication of terms into contracts or, alternatively, from the common law - see, for example, the cases cited by Campbell J in *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470 at [96]-[97]. Compare also the suggestion by Hayne JA in *Australian Football League v Carlton Football Club* [1998] 2 VR 546 at 552 that '[i]t may be that a decision of the AFL Tribunal which no reasonable person could reach is simply not a "decision" ... within the meaning of the rules and regulations of the AFL' with the reasoning of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 and *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24.
50 JJ Spigelman 'Foundations of Administrative Law' (1999) 4 *The Judicial Review* 69 at 85.