Power v The State: Some Cultural Foucauldian Reflections on Administrative Law, Corporatisation and Privatisation

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Utilising Foucault's ideas in order to understand the range and diversity of power relationships in modern Australian society, it will be argued that an approach is needed which challenges the abstract concept of the state itself. Principally, it is argued that rather than continuing to look at the question of administrative law in relation to the abstract entity of "the state", we should instead turn our focus to the concepts of power and governmentality in order to formulate an alternative theory of how government functions and how citizens are affected by its operation.

Part 1 Introduction

> "Why is it that there are so few administrative lawyers willing to live dangerously, to chance their arm and philosophise as opposed to playing safe and writing case notes?"[1]
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> "Critique doesn't have to be the premise of a deduction which concludes....It should be an instrument for those who fight and refuse what is. Its uses should be in the processes of conflict and confrontation, trials in refusal. It doesn't have to lay down the law for the law. It isn't a stage in the

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1 McAuslan, P, "Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers" (1978) 9 *Cambrian Law Review* 40, p 41, quoted in Prosser, T, "Towards a Critical Public Law" (1982) 9 *Journal of Law and Society* 63, p 77.

> programming. It is a challenge directed to what is."[2]

From humble beginnings as an adjunct to constitutional law, administrative law has emerged in the last twenty years as a legitimate branch of public law in its own right. In Australia, this situation has been largely buttressed by the extensive development of simplified and accessible avenues for aggrieved individuals to challenge government decisions with the rise of the "New Administrative Law" since the 1970s. However, despite the fact that administrative law has been an area of extensive and radical development in Australia during this period, there remains a striking dearth of theoretical debate about the appropriate position and scope of administrative law, and of public law more generally, within contemporary society.[3] In the rare instances when theory has been examined by administrative lawyers, most have tended to base their analyses on traditional models of the social structure, and traditional conceptualisations of the relationship between the state and society, rather than engage in the practice of developing original theory.[4]

A prime example of this is demonstrated by the heavy reliance administrative lawyers place on "red light" and "green light" theoretical approaches to administrative law.[5] Red light theorists, of whom Dicey is a prime example, consider that the function of administrative law is to control the power of the state so that it is not exercised in an arbitrary manner. By contrast, green light theorists believe that more confidence should be placed in the political processes rather than trying to control them, basing their model of administrative law on the facilitation of the operation of government. Both models,

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2 Foucault, M, "Questions in Method", in Burchell, G, Gordon, C, and Miller, P (eds), *The Foucault Effect: Studies in Governmentality*, Harvester Wheatsheaf, London, 1991, p 73, p 84.

3 There are however some notable exceptions which seek to challenge traditional conceptions of administrative law: see, eg, Craig, PP, *Administrative Law*, Sweet and Maxwell, London, 1994; Airo-Farulla, G, "'Public' and 'Private' in Australian Administrative Law" (1992) 3 *Public Law Review* 186; Jabbari, D, "Critical Theory in Administrative Law" (1994) 14 *Oxford Journal of Legal Studies* 189; Prosser, already cited n 1.

4 This point was made by Tony Prosser as far back as 1982: Prosser, already cited n 1, p 63.

5 See Harlow, C, and Rawlings, R, *Law and Administration*, Weidenfeld and Nicolson, London, 1984, Chs 1, 2.

however, do not problematise or challenge such fundamental notions as "government" and the "state", nor the relationship between the state and society, but simply accept them as given.

It will be argued in this article that such an approach is becoming increasingly untenable in modern Australian society, as the role of government rapidly changes and governments of all political persuasions work progressively towards the twin goals of a minimalist state and a deregulated economy. This has been particularly noticeable over the past decade with the increasing trend towards exposing governmental bodies to competition, engaging in competitive tendering for services, contracting out by government and public sector agencies and corporatisation or privatisation of the sections of government that deliver essential services to consumers.[6] As the fundamental concepts of the state and government have not been adequately theorised within traditional models of administrative law, there is much confusion and disagreement as to how administrative law should adapt in order to take account of these changes.

Administrative lawyers must engage in the process of developing original theory if there is to be structure and coherence to the way in which these changes are understood and taken up within the field of administrative law. My aim in this article is to begin this process by drawing on the work of Michel Foucault. Utilising Foucault's ideas in order to understand the range and diversity of power relationships in modern Australian society, it will be argued that an approach is needed which challenges the abstract concept of the state itself. Principally, I will argue that rather than continuing to look at the question of administrative law in relation to the abstract entity of "the state", we should instead turn our focus to the concepts of power and governmentality as developed by Foucault in order to formulate an alternative theory of how government functions and how citizens are affected by its operation.

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6 Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law: Report No 38*, 1995; Industry Commission, *Competitive Tendering and Contracting Out by Public Sector Agencies: Report No 48*, 1996.

As Foucault's work is still relatively uncommon in legal circles, I will begin with a brief overview of his work and his general theories of power and governmentality. I will then examine what Foucauldian concepts can add to the development of administrative law theory in a particular and contextualised way in relation to the debate about the proper reach of administrative law principles. In particular, I will focus on the issues of corporatisation and privatisation, and examine whether administrative law mechanisms, with a particular emphasis on judicial review, should extend to corporatised and/or privatised bodies.

It should however be stated at the beginning that I am not attempting to construct a "Foucauldian theory of administrative law" in this article, nor a "Foucauldian theory of the state".[7] Not only was Foucault highly suspicious of such claims to universal theories and ideal social models, but central to his work was the premise that he would not look to traditionally accepted receptacles of power such as the state, government, or law, as primary objects of analysis in his work. Thus, rather than trying to develop a new theory of administrative law, I will be adopting Baxter's suggestion that it is instead more useful to consider in a diffuse sense how Foucault's themes and concepts might be used and appropriated in the development of legal theory.[8]

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7 This method is based upon the approach of Alan Hunt and Gary Wickham in their examination of Foucault's relevance to law: see Hunt, A, and Wickham, G, *Foucault and Law: Towards a Sociology of Law as Governance*, Pluto Press, London, 1994, p viii.

8 Hugh Baxter, "Bringing Foucault into Law and Law into Foucault" (1996) 48 *Stanford Law Review* 449, p 450-1. In adopting this approach, I also acknowledge that many of Foucault's theoretical concepts and emphases have been widely criticised, most notably by some feminist theorists: see, eg, Ramazanoglu, C, *Up Against Foucault: Explorations of Some Tensions Between Foucault and Feminism*, Routledge, New York, 1993; Dawicki, J, *Disciplining Foucault: Feminism, Power and the Body*, Routledge, New York, 1991. My aim in this article is not to uncritically accept Foucault's work, but to utilise some of the discrete concepts he developed to consider how these can assist with the development of administrative law theory.

Part 2 Foucault: Some General Themes

Foucault's work resists "easy encapsulation or condensation", as noted by Hunt and Wickham,[9] with Foucault studying a diverse range of themes in his work which varied markedly over time.[10] The main areas of analysis that are relevant to a study of administrative law are, however, Foucault's work on power and governmentality.[11] These shall now be examined in turn, followed by an inquiry into the insights they provide in relation to administrative law.

2.1 Power

The subject of power forms one of the most central and comprehensive objects of analysis in Foucault's work.[12] In developing his thesis, Foucault does not intend to create an overarching theory of power. Rather, his aim is to develop what he terms an "analytics of power", which he opposes to theory, and which he describes as "a definition of the specific

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9 Hunt and Wickham, already cited n 7, p 3.

10 For a comprehensive overview of Foucault's work until *The History of Sexuality Volume 1: An Introduction*, Penguin, London, 1978, see Sheridan, A, *Michel Foucault: The Will to Truth*, Routledge, London, 1980. For an accessible introduction to the magnitude and scope of Foucault's work, see Rabinow, P (ed), *The Foucault Reader: An Introduction to Foucault's Thought*, Penguin, London, 1991. Also see generally Eribon, D, *Michel Foucault*, Harvard University Press, Cambridge, 1991.

11 Another area of Foucault's work that is being increasingly examined within legal theory are his ideas on the role of law in modern society. Although on a straightforward reading of Foucault's work it appears that Foucault leaves little room for law holding a significant role in modern society, his ideas on law have been extrapolated by a number of theorists: see in particular Clark, M, "Foucault, Gadamer and the Law: Hermeneutics in Postmodern Legal Thought" (1994) 26 *University of Toledo Law Review* 111; Hunt and Wickham, already cited n 7; Hunt, A, "Foucault's Expulsion of Law: Towards a Retrieval" (1992) 17 *Law and Social Inquiry* 1; Hunt, A, "Law and the Condensation of Power" (1992) 17 *Law and Social Inquiry* 57; Turkel, G, "Michel Foucault: Law, Power and Knowledge" (1990) 17 *Journal of Law and Society* 170.

12 See generally Foucault, M, *Discipline and Punish*, Pantheon Books, New York, 1977; Foucault, M, *The History of Sexuality Volume 1*, already cited n 10; Gordon, C (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1980); Foucault, M, "The Subject and Power", in Dreyfus, H, and Rabinow, P, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2nd ed, University of Chicago, Chicago, 1983.

domain formed by relations of power, and ... a determination of the instruments that will make possible its analysis".[13]

In developing this analytics of power, one of the main characteristics of power that Foucault elaborates is that power is productive:

> "We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth."[14]

In this way, Foucault is seeking to challenge both traditional liberal and marxist conceptions of power which view it as something essentially repressive and negative. Instead, Foucault offers power a more complex and interesting role, as something which is actively at work, positive and productive of knowledge.

An important consequence of this line of analysis is that Foucault does not trace power back to a single point, such as the sovereign or the state. Instead he wants to escape from the traditional view of power as sovereign command, in order to insist on the importance of what he calls the "microphysics of power", or the small powers.[15] Rather than understanding power in the conventional sense of a unified state apparatus whose task it is to ensure the subjection of citizens of a particular society, he contends that power and power relations are omnipresent and permeate every aspect of social life in an infinitely complex network. Thus, the microphysics of power emphasises "power at its extremities Ö those points where it becomes capillary Ö its more regional and local forms and institutions".[16] As a result of this focus, Foucault consequently has much more to say in his work about the small powers than he does about the big powers, or macrophysics of power, examining such topics as the functioning of prisons and the regulation of sexuality, rather than looking at such questions as the role of the state, or

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13 Foucault, *The History of Sexuality Volume 1*, already cited n 12, p 82.

14 Foucault, *Discipline and Punish*, already cited n 12, p 194.

15 id, p 26.

16 Foucault, M, "Two Lectures", in Gordon (ed), already cited n 12, p 96.

other major institutional conglomerates of power in our society.

In displacing the traditional notion of power as sovereign command, or as simplistically imposed from above, Foucault's conception of power also emphasises that power relations involve and engender resistance:

> "Where there is power there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power."[17]

Resistance is not external to power, or merely a result of power's application, but rather an integral part of the way in which it functions, with points of resistance present everywhere in the complex network of power relations. Power is thus not something to be taken, used or possessed, but is a relation, something exercised through particular techniques and strategies in particular situations.

As a result of this shift in focus to the microphysics of power, Foucault spent much time examining the concept of "disciplinary power".[18] His key argument is that discipline emerged as the main form of modern micropower in the seventeenth century. In contrast to pre-modern power, or the "majestic rituals of sovereignty or the great apparatuses of the state",[19] disciplinary power does not rely on force or coercion, but operates as micropower, employing tiny, everyday surreptitious mechanisms of control:

> "The chief function of the disciplinary power is to 'train' .... Discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise. It is not a triumphant power, which because of its own excess can pride itself on its omnipotence; it is a modest, suspicious power,

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17 Foucault, *The History of Sexuality Volume 1*, already cited n 12, p 95.

18 See in particular Foucault, *Discipline and Punish* already cited n 12.

19 id, p 170.

> which functions as a calculated, but permanent economy."[20]

Foucault specifically traces the spread of disciplinary technologies in the military, schools, factories, orphanages, hospitals, and prisons.[21] Using these examples, he extrapolates three general characteristics of disciplinary power. The first is "hierarchical observation", which involves arranging individuals in order to ensure continuous surveillance.[22] Second, discipline operates through "normalising judgments",[23] such that norms or regulations specify the goals which those subject to the disciplinary power must strive to achieve, and use punishments or rewards to encourage norm-conforming behaviour. Third, "the examination" combines both of these techniques to invoke "a normalising gaze, a surveillance that makes it possible to qualify, to classify and to punish."[24]

Foucault suggests that Jeremy Bentham's Panopticon provides the primary example of these disciplinary techniques having practical effect.[25] The Panopticon was an architectural design for a prison, which consisted of cells arranged in a ring-shaped building with a tower at the centre in which the guard would be present, yet invisible. This arrangement combined all the techniques of disciplinary power, ensuring that the inmates were in "a state of conscious and permanent visibility that assures the automatic functioning of power."[26] Although examining it primarily in terms of prisons, Foucault also sees the Panopticon generally as "a figure of political technology",[27] arguing that this mechanism of disciplinary power eventually became detached from particular institutions such as the prison and came to circulate throughout society, wherever such techniques were necessary, in order to help form a totally disciplinary and regulated society.

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20 ibid.
21 See id, pp 170-94, 231-56.
22 id, pp 170-7.
23 id, pp 177-84.
24 id, pp 184-92.
25 id, pp 200-9.
26 id, p 201.
27 id, p 205.

2.2 Governmentality

Another important stage in Foucault's work in terms of its usefulness for an alternative theory of administrative law is his shift in focus from discipline to the question of government.[28] The governmental theme and the macrophysical examination of governmental rationality came to occupy a key position in Foucault's later philosophy, and in many ways can be seen as an extension of, and as complementary to, his work on the microphysics of power. However, through the use of the concept of governmentality, Foucault does not want to present an alternative theory of the state, or even accord great significance to the state, but rather identify a particular way of governing that has emerged within Western society.

For Foucault, modernity is marked by the emergence of a particular activity, or practice of government which he terms "governmentality".[29] His historical thesis is that during the eighteenth and nineteenth centuries the modern practices of government came to the fore for the first time, extending upon the theory of the "art of government" which emerged in the sixteenth and seventeenth centuries. His central argument is that in the eighteenth century a transition took place from an art of government, which had been stifled by being trapped within the rigid juridical framework of sovereignty, to a new system of "governmentality", or "governmental rationality", which turned primarily on the emergence of the problematic of population.

It was at this time that population first emerged as the ultimate end of government. In contrast to sovereignty, government thus has as its purpose not the act of government itself, but the welfare of the population, the improvement of its condition, their wealth, misfortunes, health and longevity. In

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28 The basis of Foucault's work on governmentality is a series of seminars and lectures which Foucault gave at the College de France in Paris as Professor in a specially created Chair in the History of Systems of Thought. Unfortunately, the majority of this work remains unpublished, as the publication of the complete lecture series has been precluded as a result of the interpretation of Foucault's will: see Gordon, C, "Governmental Rationality: An Introduction" in Burchell, Gordon and Miller (eds), already cited n 2, p 1. As a result of this, I am relying heavily on Gordon's interpretation of Foucault's lectures in the above mentioned article. In addition, one of the lectures which Foucault gave has also been published: Foucault, M, "Governmentality", in id, p 87.

29 Foucault, "Governmentality", already cited n 28, pp 98-104.

this way, "[t]he population now represents more the end of government than the power of the sovereign".[30] In addition, this focus necessitated that a new reason of state and new mentalities of government develop, in order for government to be able to govern the population "effectively in a rational and conscious manner".[31]

The emergence of these new and distinctive mentalities of government has much in common with Foucault's analysis of the microphysics of power. Indeed, Foucault specifically argued that the same type of analysis he had used to study the techniques and practices of micropower could also be applied to techniques and practices for governing populations at the level of political sovereignty over an entire society.[32] However, the result of this shift in focus to governmentality involves asking what the *purpose* of power is, as well as examining how it works.[33] Consistent with the pervasive presence of power relationships at all points of the social body, these new forms of governmental rationality could concern not only relations concerning the exercise of political sovereignty, but also the relation between self and self, private interpersonal relations involving some form of control or guidance, and relations within social institutions and communities.[34] In addition, the new practices of government are not distinct from discipline, but rather intimately linked to it, involving a calculating preoccupation with activities directed at shaping, controlling and guiding the conduct of the population.[35] As a result:

> "Ö we need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society with a society of government; in reality one has a triangle, sovereignty-discipline-government, which has as its primary target the population and as its

30 id, p 100.

31 ibid.

32 Gordon, already cited n 28, p 4.

33 See Simons, J, *Foucault and the Political*, Routledge, New York, 1995, p 37.

34 id, pp 2-3.

35 Gordon, already cited n 28, p 2.

> essential mechanism the apparatuses of security."[36]

In this way, although emphasising the practice of government, Foucault rejects the traditional notion of the state as an omnipotent source of power, and as a coherent, calculating subject whose political power grows in connection with its place in civil society. It is simply one of the many loci of power in society, and Foucault continues to insist that we should not place too much emphasis on its role in the normalisation and disciplinarisation of society at the expense of other techniques of micropower which also possess governmental rationality.

Instead, the state is viewed as an ensemble of institutions, procedures, tactics, calculations, knowledges and technologies, which together comprise the particular form of government, and as only one of the many institutions in society which performs such governing functions.[37] He insists that the state does not possess the unity, the individuality, nor the importance that traditional theory espouses, and instead posits that:

> "... the state is no more than a composite reality and a mythicised abstraction, whose importance is a lot more limited than many of us like to think. Maybe what is really important for our modernity - that is, for our present - is not so much the *Étatisation* of society, as the 'governmentalisation' of the state."[38]

Foucault views this governmentalisation of the state as a paradoxical phenomenon, because while the emergence of governmentality and the new techniques of government have given such governing powers to other societal institutions apart from the state, thus reducing its power, it is precisely thanks to governmentality, which is both internal and external to the state, that the state is still generally considered to be omnipresent today since:

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36 Foucault, "Governmentality", already cited n 28, p 102.

37 See Gane, M, and Johnson, T, "Introduction: The Project of Michel Foucault", in Gane, M, and Johnson, T (eds), *Foucault's New Domains*, Routledge, New York, 1993, p 7.

38 Foucault, "Governmentality", already cited n 28, p 103.

> "it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on; thus the state can only be understood in its survival and its limits on the basis of the general tactics of governmentality."[39]

Given this, it is argued that it is better not to look at any one entity called "the state" in order to analyse what it encompasses, but rather it is more productive to examine power and governmental practices without limiting their analysis by reference to this supposedly overarching entity.

2.3 Foucauldian Themes and Administrative Law

In terms of an analysis of administrative law, the question clearly arises as to whether it is possible to imagine this area of the law without focussing on the state as the primary theoretical subject, as suggested by Foucault's theory. As administrative law is traditionally described as the body of principles and rules that govern the exercise of powers and duties by state authorities, to suggest that the state is not all-powerful may appear untenable. However, administrative law can also be described more generally as the body of law concerning decisions made by public administrators.[40] Such a definition, rather than emphasising the state, instead serves as a starting point to focus on the type of power exercised, and the purpose for which it is being exercised.

Beginning with this definition, it is my intention in the following sections of this article to suggest that by utilising Foucault's concepts of power and governmentality, and placing to one side the concept of "the state", administrative law can be reconceptualised in terms of what "public administration" actually means, by reference to the type of power that is being exercised by those in positions of governmental authority and the purpose for which such power is being exercised. By adopting this approach I do not suggest that the state does not "exist", which is clearly unfounded, and which Foucault neither suggests. Instead, I argue that

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39 ibid.

40 See Allars, M, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990, p 1.

the concept of the state should not be accorded such importance as has been traditionally accepted if current changes in the structure of government are to be adequately incorporated in administrative law theory. Whether such a shift in focus away from the state is possible in practice, or indeed desirable, is a different question, but I hope to at least open up the traditionally confined and conservative analysis which currently pervades legal theory on administrative law.

A shift in focus away from the "state" would clearly have enormous ramifications for all aspects of administrative law and administrative law theory. In the following section, I will demonstrate that problematising the concept of the state provide insight into the issue of the proper reach of administrative law principles, particularly in response to the developments of corporatisation and privatisation. This theme forms the principal focus of my theoretical analysis.

Part 3 How Far Should Administrative Law Principles Extend?: Foucault And The Phenomena Of Corporatisation And Privatisation

> "Power exercised behind the scenes is power nonetheless."[41]

The catchphrases of 1990s government in Australia could be said to be "economic rationalism", "corporatisation" and "privatisation". An ever growing number of government bodies and services are now being either converted into a corporatised structure or privatised, at both the state and federal levels, ranging from airlines and prisons to electricity, water and telecommunications providers. In Victoria in particular, the issue has come to the fore in recent years with the privatisation of water and electricity service providers, and the corporatisation of a great number of other government interests. There is however much disagreement and confusion as to whether administrative law principles and mechanisms should extend to such bodies, and in Australia this has been exacerbated by a lack of academic or theoretical debate on this

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41 *R v Panel on Take-Overs and Mergers; ex parte Datafin PLC* [1987] 1 QB 815 at 849 (Lloyd LJ) ('*Datafin*').

issue.[42] In this section I will focus in greater detail on the current position of such entities within the Victorian administrative law system, particularly in relation to the water and electricity industries, before examining how a Foucauldian analysis can help bring some increased theoretical clarity to the question of whether such bodies should be regulated to a greater degree by administrative law.

Firstly, however, it is helpful to briefly distinguish between the two processes of corporatisation and privatisation. Corporatisation essentially involves the introduction of a corporate legal structure to the body in question while the government, or more specifically Ministers, remain the main or only shareholder, holding shares on behalf of the public. As a result of this corporate legal structure, the state-owned enterprise (SOE) is supposed to have purely commercial objectives. In addition, although the SOE is still government owned, it operates in a competitive business environment and is to be subject to the same rules as any other private business.[43] Privatisation is the next step on from corporatisation, and involves the sale or transfer of such public or governmental enterprises, generally in corporatised form, to private interests.[44]

3.1 Administrative Review of Corporatised and Privatised Entities in Victoria[45]

In the spirit of new managerialism and prevalent laissez-faire economic policies, official justifications and arguments in favour of corporatisation and privatisation have been based on

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42 See however, Batskos, M, "State-Owned Enterprises - Does Administrative Law Apply?" (1994) 68 *Law Institute Journal* 839; Dixon, N, "Should Government Business Enterprises be Subject to Judicial Review?" (1996) 3 *Australian Journal of Administrative Law* 198. Also now see Whincop, M, and Keyes, M, "Corporatisation, Contract, Community: An Analysis of Governance in the Privatisation of Public Enterprise and the Publicisation of Private Corporate Law" (1997) 25 *Federal Law Review* 51.

43 Batskos, already cited n 47, p 839, n 1; Taggert, M, "Corporatisation, Privatisation and Public Law" (1991) *Public Law Review* 77. In Victoria, see, for example, *State Owned Enterprises Act* 1992 (Vic) ('*SOE Act*').

44 Batskos, already cited n 47, p 839, n 1; Taggert, already cited n 48, p 92. In Victoria see, for example, *Electricity Industry Act* 1993 (Vic); *Water Industry Act* 1994 (Vic).

45 For an examination of the availability of administrative review mechanisms for Commonwealth Government corporatised entities, see Administrative Review Council, already cited n 6, pp 16-33.

the claim that in order to be economically efficient and to improve performance, government business entities should be subject only to the impersonal disciplines of the market and market forces, rather than be left under the heavy handed political control of government.[46] Implicit in these justifications is a reliance on a particular view of the state and its appropriate role in modern society. Essentially, the state is viewed as repressive and an entity whose power should be minimised, similar to the view of the state that is adopted by red-light theorists. In this way, it is assumed that a split can readily be made between the public and private spheres, and that such business entities would perform better in the free, private market sphere.

It is however fundamental to the government rhetoric associated with processes of corporatisation, and in particular privatisation, that the services provided to consumers will continue to be supplied or produced to the same extent as when they were under government control.[47] Yet because of the focus on business efficiency and competition in the private sphere, governments do not intend that administrative law be a mechanism which consumers can use to ensure that this is the case. As a result, the options governments have provided for administrative review of decisions made by corporatised and privatised entities are deliberately very limited.[48]

To begin with the administrative law position with respect to SOEs in Victoria,[49] it is unlikely that judicial review of

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46 Graham, C, "'All That Glitters Ö' - Golden Shares and Privatised Enterprises" (1988) 9:1 *The Company Lawyer* 23; Graham, C, and Prosser, T, "Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques" (1987) 50 *Modern Law Review* 16, p 30-1.

47 Allars, M, "Private Law but Public Power: Removing Administrative Law Review from Government Business Entities" (1995) 6 *Public Law Review* 44; "Some General Legal Aspects of 'Privatisation'" (1987) 61 *Australian Law Journal* 267, p 268.

48 There is the possibility however, that review may still available at common law: see nn 64-81 below and accompanying text.

49 Although administrative law mechanisms are very limited with respect to corporatised bodies, some accountability mechanisms do exist under the *SOE Act*, including the delivery of reports and financial information to the Treasurer (s74), and the requirement that the Treasurer present accounts and reports to Parliament (s75). There are also a number of additional requirements under other statutes, such as the Corporations Law. Further, there is the existence of such bodies as the Electricity

decisions made by such entities would be available under the *Administrative Law Act* 1978 (Vic). Section 3, the key provision of the Act, provides that any person affected by a decision of a tribunal may make an application to the Supreme Court of Victoria for an order calling on the tribunal to show cause why the decision should not be reviewed. The question of whether review is available therefore centres around whether a "decision" has been made, and whether the body in question is a "tribunal", both terms defined for the purposes of the Act in section 2. A tribunal is defined as a person or body of persons who is or are by law required to act in a judicial manner to the extent of observing one or more of the rules of natural justice. As it is improbable that SOEs would be required to apply natural justice, they would not fall within the definition of a tribunal for the purposes of the Act, and thus judicial review would not be available.[50]

With respect to other forms of administrative law review and the position of SOEs, the governing law in Victoria is found in the *State Owned Enterprises Act* 1992 (Vic) (the *SOE Act*), which is the piece of legislation providing the basic legislative principles and structure to the corporatisation process in Victoria. A review of the merits of a decision made by an SOE is not available, as the *SOE Act* does not preserve review by the Victorian Civil and Administrative Tribunal ("VCAT") of a decision-making power exercised by an SOE converted from a statutory corporation. However, merits review will be available

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Industry Ombudsman of Victoria, governing the electricity industry, and the Office of the Regulator General (see *Office of the Regulator General Act* 1994 (Vic)). However, I will not be focussing on these accountability mechanisms in this article, agreeing with Dixon that "the adequacy or otherwise of political and legal accountability mechanisms is not the real basis upon which to assess the appropriateness of applying judicial review to GBEs and diverts attention away from the real question as to *why* it should apply. Ö Ensuring that GBEs remain accountable and focusing on the adequacy of the political and legal mechanisms appears to sidestep the question of need for judicial review.": Dixon, already cited n 47, p 202. In relation to the accountability procedures of the Office of the Regulator General, see Stuhmcke, A, "Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry" (1997) 4 *Australian Journal of Administrative Law* 185.

50 In relation to the *Administrative Decisions (Judicial Review) Act* (Cth), see also *General Newspaper Pty Ltd v Telstra Corporation* (1993) 117 ALR 629.

in the limited phase when a body is declared to be a "converting body" in transition to becoming an SOE.[51]

As SOEs are still government owned, they are theoretically subject to the *Freedom of Information Act* 1982 (Vic) (the "*FOI Act*") and to investigation by the Ombudsman. However, SOEs can be exempted from the *FOI Act* and investigation by the Ombudsman if the Governor in Council makes regulations prescribing the SOE for the purposes of the *SOE Act*.[52] As a result, the potential exists for all SOEs to be removed from the operation of these administrative review mechanisms.[53]

The lack of administrative review mechanisms provided with respect to privatised entities is, not surprisingly, even starker, following on from the view that the market is the most appropriate mechanism to regulate the activities of such bodies. Again, there is no possibility of judicial review under the *Administrative Law Act* 1978 (Vic), as similar to SOEs, privatised business entities would not fall within the definition of a tribunal under the Act as they would not be required to apply rules of natural justice.[54] Nor would it seem that merits review would ever be available in VCAT, based on the philosophy that the market should regulate such bodies, and evidenced by the fact that merits review has not been granted with respect to any privatised bodies in Victoria to this date.[55]

The position regarding Freedom of Information and resort to the Ombudsman is less clear. The *Electricity Industry Act* 1993 (Vic), for example, which governs the privatisation of Victoria's electricity industry, specifically excludes the operation of the *FOI Act* in relation to electricity corporations.[56] Similarly, the Act also excludes resort to the Ombudsman.[57] Similar

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51 *SOE Act* 1992 (Vic) ss 59, 65, 66. See also Batskos, already cited n 47, p 839.

52 *SOE Act* 1992 (Vic) s 90(1)-(2). See also Batskos, already cited n 47, p 839.

53 See Stuhmcke, already cited n 49, p 190.

54 Again, however, the position at common law is unclear: see below nn 62-76 and accompanying text.

55 See generally *Electricity Industry Act* 1993 (Vic); *Water Industry Act* 1994 (Vic).

56 *Electricity Industry Act* 1993 (Vic) s 91A.

57 *Electricity Industry Act* 1993 (Vic) s 91AB. There is, however, a private industry Ombudsman, the Electricity Industry Ombudsman, which oversees the operation of the privatised electricity industry.

provisions are not present in the *Water Industry Act* 1994 (Vic), which governs the privatised water industry in Victoria, which would seem to indicate that resort to these administrative law mechanisms is still possible in this industry. Ultimately, however, the administrative law mechanisms which have been expressly provided by the government in relation to both corporatised and privatised bodies are very limited.

3.2 Should Further Administrative Review Mechanisms be Available?

The lack of administrative review mechanisms explicitly provided for corporatised and privatised entities in Victoria follows on from the complete faith government holds in the market to regulate such bodies. Government rhetoric heralds a new era of private sector accountability, and it is private law mechanisms which are given primacy with respect to controlling the operations of these bodies.[58] This private sphere of regulation is seen as vastly different to that of the state, on the basis of the simple dichotomy which is commonly assumed to exist between the public and private spheres. That which is considered to fall within the auspices of "the state" is seen as properly governed by administrative law, with all other forms of decision-making considered to be correctly within the sphere of "private law" regulation.

Although there have been a number of critiques of this distinction between "public" and "private" law, they have tended to examine the distinction primarily in terms of practice, focussing on the interpenetration of public and private law mechanisms and remedies.[59] Drawing on the work

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58 Barnes, J, "Is Administrative Law the Corporate Future?" (1993) 21 *Australian Business Law Review* 66.

59 See eg, Airo-Farulla, already cited n 3; Cockrell, A, "'Can You Paradigm?' ó Another Perspective on the Public Law/Private Law Divide", in *Administrative Law Reform* 227. This is not to say that such work has not looked at theoretical issues in a general sense, but rather that their primary focus is on these more practical issues. Also, this is certainly not to say that the public/private dichotomy has not been examined in a theoretical sense, as feminist theorists have particularly done, but that the distinction between public and private *law* has not been theorised in any great detail. For feminist critiques of the public/private dichotomy, see eg Pateman, C, "Feminist Critiques of the Public/Private Dichotomy", in Benn, S, and Gaus, G (eds), *Public and Private in Social Life*, Croom Helm, London, 1983, p 281; Thornton, M, (ed), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995.

of Foucault as examined above, I will analyse how the distinction is also untenable in a more theoretical sense.

One of the main arguments used to justify the public law/private law distinction suggests that public law is treated separately because the relationship between the state and the individual is one between fundamentally unequal parties.[60] As a result of this power imbalance, in order to ensure the accountability of government, more stringent rules and regulatory mechanisms are present in public law than in private law. This argument thus implicitly suggests that private law concerns relationships between parties with equal power.[61] However, this rationale loses all validity when omnipotent power of the state is rejected and the issue of power as conceptualised by Foucault is instead examined in its place.

On a Foucauldian reading, as all power does not emanate from the state, but is multifarious and infinitely dispersed in a complex network through every aspect of social life, the argument that unequal power relationships only exist for citizens in relation to their dealings with the state is indefensible. Not only is power present at all points in society, but power that operates according to techniques of governmental rationality clearly exists outside the sphere of traditional "state" regulation, such that the population is effectively regulated and disciplined by numerous institutions throughout society.

Once the issue is reframed in this way, it becomes clear that bodies in the "private" sphere neither necessarily hold less power than those traditionally viewed as falling under the auspices of the state, nor exist in an equal relationship with other bodies or individuals in the "private" sphere. The nature of power is also such that it should not be seen as necessarily more benign when exercised in the "private" sphere, as along with traditionally accepted forms of public power, power as exercised in the "private" sphere can also operate according to distinct mentalities of governmental rationality.

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60 Cockrell, already cited n 63, pp 227-8.

61 ibid.

The public law/private law distinction particularly comes unstuck with many corporatised and privatised bodies, especially in relation to monopolistic enterprises which possess dominant market power and provide essential services, such as the privatised water and electricity industries. These bodies hold a great degree of power over the lives of individual citizens, and thus do not exist within the general paradigm of private law relationships between "equal" parties. Instead, I would argue that these bodies operate according to distinct mentalities and systems of governmental rationality. As they have complete control over the delivery of essential services to citizens, their activities directly affect the entire population, in potentially adverse ways. The population also has no choice but to submit to the control these bodies have over their lives, with the practices and procedures of these bodies thus shaping and channelling the conduct of the public.

In arguing that the public law/private law distinction comes unstuck in relation to certain corporatised or privatised bodies, I am not advocating that the distinction should be done away with altogether. Although I am arguing that we need to look to the fact that power is exercised at a multitude of points throughout society, rather than all emanating from "the state", this is not to suggest that all power is the same nor that all exercises of power, whether they occur in the public or the private sphere, should be regulated by administrative law.[62] Rather, I argue that in terms of whether public law, in particular administrative review mechanisms, should apply to a body, then the type of power being exercised is also relevant. Although power is ubiquitous in our society, all power is not equal: despite the fact that power exists throughout society, clearly some institutions in society operate according to distinct mentalities of governmental rationality that can radically affect and shape the lives of a great number of people. It is thus only pragmatic to recognise that certain forms of power would be more appropriately regulated by the procedural safeguards and greater accountability that administrative law mechanisms provide.

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62 Cf the "power argument" that Black identifies as one argument in favour of judicial review of self-regulatory associations: see Black, J , "Constitutionalising Self-Regulation" (1996) 59 *Modern Law Review* 24, p 29-30.

On such an approach, many corporatised and privatised bodies would thus fall under the proper auspices of administrative law, because the nature of their power is often a far-reaching and wide-ranging one affecting the lives of all citizens. This particularly applies to the privatised water and electricity industries which because of their monopolistic nature affect the lives of the population in an extremely complete and diffuse way. I do not to suggest that it is solely as a result of the exercise of monopoly power that administrative law mechanisms should apply to these industries, but rather that this monopoly adds to the governmental rationality that these industries employ, which should be the most important factor in determining the amenability of administrative review. This also means that administrative law should not be available to review all decisions made by such bodies, but only those decisions which operate according to disciplinary techniques of power that impact adversely on individual citizens, such as those concerning the supply and connection of services.

In recognising that the nature of the power rather than its source is the key to whether administrative law mechanisms should apply to a body, the true nature of the power must be examined without reference to "the state" and traditional conceptions of "public" and "private". Rather than public power, this could perhaps be termed "governmental" power, as governmental is understood by Foucault. Alternatively, to avoid confusion with the sense in which the word "governmental" is traditionally understood, this could be termed "bureaucratic" power. This would also be "bureaucratic" understood in a wide sense as power exercised by bureaucratic institutions possessing governmental rationality, which significantly affect the lives and interests of a large proportion of the population.

Such a shift in our understanding of "public" power clearly has radical potential for dealing with the issues of public accountability and appropriate safeguards to the exercise of power that the phenomena of corporatisation and privatisation pose. The major question raised by these ideas is whether administrative law mechanisms can adapt in the future to incorporate this conception of "public" power. Such a move would take account of the diminishing role of traditional government in our society while at the same time ensuring that bodies exercising what has conventionally been viewed as

"state" power are regulated in their dealings with the population.

In the following section, I will examine whether there is scope within current judicial thinking to accept such a conception of "public" power, most specifically in relation to corporatised and privatised government entities in Victoria. I am doing so despite the specifically limited provision of administrative law mechanisms provided by government in relation to corporatised and privatised bodies, as there may still remain some residual scope for judicial review at common law.

Part 4 Public Power And The Potential For Foucauldian Change In Administrative Law: An Examination Of Current Case Law

Although the source of power being exercised has traditionally been viewed as the relevant issue in determining whether decisions made by a body should be amenable to judicial review at common law, there are a number of recent cases which have placed greater emphasis on the nature of the power exercised by the body. In this section I will argue that this shift has produced a theoretical space in judicial discourse within which a broader conception of "public" power could potentially be expounded.

4.1 State of Victoria v Master Builders' Association of Victoria[63]

The *Master Builders* case is the most recent Australian decision which indicates the potential for courts to adopt a more expansive view of "public" power. In this case, the Appeal Division of the Supreme Court of Victoria recognised that the nature of the power exercised rather than its source as a relevant factor in determining whether a decision of the body in question was amenable to judicial review.[64]

The body in question in this case was the Building Industry Task Force (the "Task Force"), a non-statutory task force

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63 [1995] 2 VR 121 (Tadgell, Ormiston and Eames JJ) ("*Master Builders*").

64 For a discussion of the decision in this case, see Robinson, M, and Harvey, I, "Private Law vs Public Law: Issues in Government Liability", in *Government Liability, Issues in Public Law: 4th Annual Workshop*, BLEC Books, 1995.

established by the Victorian government to deal with collusive tendering and other corrupt practices in the Victorian building industry. In August 1993 the Task Force sent a letter to 750 building contractors in Victoria setting out the terms upon which the Victorian Government would be prepared to deal with building contractors. Each contractor was invited to provide a pro forma statutory denying any involvement in collusive practices in the last 6 years. In September 1993 the Task Force sent a "black list" of 240 names to all Victorian government departments and agencies and municipal councils who in the Task Force's opinion had not satisfactorily responded to the August 1993 letter. As a result, these black listed contractors were not allowed to tender for or be awarded government building contracts. The Master Builders' Association brought proceedings in the Supreme Court of Victoria on behalf of building contractors seeking injunctive and declaratory relief against the Task Force's activities. The remedy ultimately sought was a declaration that the actions of the Task Force in sending the letter and in preventing or seeking to prevent building contractors from tendering or being awarded building contracts by the State of Victoria were unlawful.

The Court held that the sending of the letter and the actions of the Task Force were not undertaken pursuant to any statutory power, but were undertaken in the exercise of the prerogative power. The source of power of the Task Force was therefore directly relevant to the decision, with the conduct of the body being "under direct government aegis".[65] As a result, the court did not have to consider whether judicial review would be available for a body whose power did not derive from statute, prerogative nor common law. Nevertheless, the court also examined the nature of the power that the body exercised, in addition to its source, in order to decide that decisions made by the Task Force were amenable to judicial review at common law.[66]

The decision of Eames J in particular emphasised the approach of examining the nature of the power exercised

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65 [1995] 2 VR 121 at 137 (Tadgell J).

66 This decision was possible despite the body not falling within the definition of a tribunal for the purposes of the *Administrative Law Act* as the Act does not codify common law grounds of review, but merely supplements them: *Administrative Law Act* 1978 (Vic) s 7.

rather than just its source, and the requirement that the power involve a public element. In determining whether the actions of the Task Force were amenable to judicial review, Eames J drew on English case law to state that the question is essentially two-fold. The first issue to examine is whether the body is exercising public law functions or possesses a public law element. Second, it must be determined whether the body has functions which have a public law consequence.
Eames J stated that in order to decide if a public law element is involved in the making of a decision, there must be:

> "[A] comprehensive analysis of the nature of the power being exercised, the characteristics of the body making the decision, and the effect of determining that the exercise of the power is not amenable to review. The source of the power would also remain a relevant, but not determinative factor to be considered."[67]

Through examining these factors, it was decided that the Task Force was amenable to judicial review. Of particular importance to this decision was the fact that the body exercised a great degree of coercive power, the improper exercise of which may have had potentially disastrous effects on building businesses in question.[68] In addition, Eames J emphasised the immense public importance of the integrity and efficiency of the building industry, and the need to eliminate corrupt practices as factors relevant to deciding that judicial review was available.[69]

Although the source of the power exercised was a relevant, albeit "not determinative" factor in this case in deciding that the actions of the Task Force were amenable to judicial review, the *Master Builders'* decision clearly demonstrates the potential for a broader conception of "public" power to be adopted as the test in deciding whether decisions of a body should be amenable to judicial review at common law.

4.2 *R v Panel on Take-Overs and Mergers; ex parte Datafin.*[70]

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67 [1995] 2 VR 121 at 163.
68 id, p 164.
69 ibid.
70 [1987] 1 QB 815 (Sir John Donaldson MR, Lloyd and Nicholls LJ).

In the *Master Builders'* case, the Court placed much emphasis on the decision of the English Court of Appeal in *Datafin.* The body in question in *Datafin* was the London City Panel on Take-Overs and Mergers (the "Take-Over Panel"). This body was a privately-created regulatory body with no statutory, prerogative or common law powers, nor was it in any contractual relationship with the financial market which it regulated. "[W]ithout any visible means of legal support",[71] the Take-Over Panel did however undertake an important financial and regulatory function. In an unprecedented move, the English Court of Appeal decided that the prerogative writ of certiorari lay against the Take-Over Panel despite the fact that it was created neither by statute or prerogative, stating that the source of power of the body was not the sole test of whether a body was subject to judicial review. Rather, the decisive factor was the *nature* of the power which the body exercised. Lloyd LJ, with whom Nicholls LJ agreed, stated that:

> "If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may Ö be sufficient to bring the body within the reach of judicial review."[72]

In a similar vein, Sir John Donaldson MR stated that if the body is exercising power involving a "public element", then it will be susceptible to judicial review.[73] The fact that the body in question in *Datafin* was self regulatory was not seen to make it less susceptible to judicial review, with Lloyd LJ instead recognising that such bodies can hold immense power that should be controlled by the courts. He stated that "[s]o long as there is a possibility, however remote, of the panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility".[74]

The essential requirement for the availability of judicial review on the basis of the reasoning in *Datafin* is therefore that the body in question be exercising a public law function, or that

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71 id, p 824 (Sir John Donaldson MR).
72 id, p 847.
73 id, p 838.
74 id, p 846.

its power have a public element. The source of power of the body was not however considered to be completely irrelevant in this case. Although fundamentally examining the nature of the power, Lloyd LJ and Sir John Donaldson MR agreed that judicial review would not be available in respect of bodies whose sole source of power is a consensual submission to its jurisdiction, or contractual.[75]

4.3 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*[76]

Although there have been no decisions in Australia on the specific issue of whether SOEs or privatised bodies would be found to be amenable to judicial review according to this principle, there is a New Zealand case considered by the Privy Council concerning the corporatised New Zealand electricity industry which supports this occurrence in the future. In *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, after examining the New Zealand *State Owned Enterprises Act*,[77] the Privy Council explicitly rejected the reasoning of the New Zealand Court of Appeal that SOEs are no different from private companies and not subject to judicial review. Lord Templeman said:

> "A state enterprise is a public body Ö [It] carries on its business in the interests of the public. Decisions made in the public interest by the corporation Ö may adversely affect the rights and liberties of private individuals without affording them any redress."[78]

As a result of this reasoning, the SOE in question in this case was found to be subject to judicial review. Arguably, the case in Victoria is even stronger for judicial review of decisions of SOEs. As one of the principle objectives of the *SOE Act* is that bodies perform functions for the "public benefit", the Victorian Act thus emphasises the public and its interests in the power being exercised to a much greater extent than the New Zealand Act.[79]

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75 id, pp 838, 847.

76 [1994] 1 WLR 521 (Lords Templeman, Goff, Mustill, Slynn and Woolf) ('*Mercury*').

77 See *State Owned Enterprises Act* 1986 (New Zealand).

78 [1994] 1 WLR 521 at 526.

79 See *SOE Act* 1992 (Vic) s 69. Cf *State Owned Enterprises Act* 1986 (NZ) s 4(1). Also see Batskos, above n 47, p 840.

4.4 Judicial Acceptance of Foucault?

Following the decisions in the above cases, which have all challenged traditional conceptions of public power, it is clear that there is potential for judicial acceptance of a broader understanding of "public" power as I have advocated in this article using the work of Foucault.

Although in each of the cases discussed the source of power exercised by each body was considered to be a relevant factor, this was not determinative in itself and the nature of the power exercised was also seen as important in deciding whether a body should be subject to judicial review at common law. In addition, as the precise definition of "public element" was left open by the court in *Datafin*, that decision clearly provides scope for the recognition of Foucauldian elements within the substantive law of judicial review. This would be possible if this concept of power with a "public element" was defined as power that operates according to distinct mentalities of governmental rationality. Thus, corporatised or privatised bodies that exercise power according to such mentalities could potentially be subject to judicial review in relation to those decisions that affect individual citizens in a comprehensive and controlling way.

Although the potential thus exists for judicial acceptance of a broader understanding of "public" power, it would be a much greater step for courts to recognise that institutions in society which exercise "governmental" or "public" power in a Foucauldian sense, but whose source of power does not emanate from the "state", should be susceptible to judicial review. This would require the courts forsaking an examination of the source of power altogether in favour of a focus upon its nature which is a much more radical move.

In all of the cases discussed, although the nature of the power which the particular body is exercising is examined, the courts are still applying the traditional public law/private law distinction, but have simply expanded the concept of "public" to include a wider range of entities. The decisions therefore do not really challenge "the state" as it first appears, but simply widen the idea of what can be considered to be within the auspices of state power. It could therefore be argued that they are not truly looking to the nature of the power, but are in fact

still looking at its source in the sense that the power is broadly considered to be "state" power.

This more narrow understanding of power can be evidenced from a number of English cases since *Datafin* which have limited the potential of an examination of the nature of the power exercised by a body quite considerably. In *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; ex parte Wachmann*,[80] Simon Brown J stated that there had to be not merely a public, but potentially a governmental interest in the decision-making power in question, thus greatly increasing the link necessary with the state before a decision will be judicially reviewable. Similarly, in *R v Disciplinary Committee of the Jockey Club; ex parte Aga Khan*,[81] the Court of Appeal again decided that the body in question there was in no sense governmental based on its origin, history, constitution and membership, even though it was acknowledged that it was exercising powers in the interest of the public, which affected the public.

Although these decisions indicate that courts are reluctant to move completely away from an examination of the source of power of a body, I would argue that some potential does remain for this to be done based on the fact that in both Australia and England, the courts have recognised for many years that non-statutory bodies and bodies which do not exercise prerogative power, such as unions, political parties, sporting clubs and professional disciplinary tribunals, may exercise a form of public power.[82] Despite the absence of statutory power, such bodies have been commonly held to be susceptible to judicial review at common law on the grounds of procedural fairness. Rather than statutory, the source of power of such bodies is the set of contractual obligations and rights of members set out in the rules which members agree to accept upon joining the relevant body.

Forbes v New South Wales Trotting Club Ltd[83] is an example of an Australian decision where such a body was held to be amendable to judicial review. In this case, the New South Wales Trotting Club (the "Club") warned off the plaintiff, a

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80 [1993] 2 All ER 249.

81 [1993] 2 All ER 853 (Bingham MR, Farquharson and Hoffmann LJJ).

82 See Allars, already cited n 47, pp 74-5.

83 (1979) 143 CLR 242 (*"Forbes"*).

race-goer, from two courses it owned and "any other course which may now or in the future be occupied by or come under the control" of the Club. The Rules of Trotting, under which the Club administered trotting in New South Wales, empowered the committee of the Club to warn any person off any trotting course at its own discretion and to warn any person off any course it controlled. The resolution of the Club which warned off the plaintiff was made without notice to the plaintiff and he was given no opportunity to make representations before the committee of the Club.

In this case it was decided that the Club was bound by the rules of procedural fairness and had denied the plaintiff procedural fairness in making the resolution in this manner. The resolution was therefore held to be invalid.

Most interestingly in this case however, are observations in obiter of Barwick CJ and Murphy J which suggest that public power may extend even further than such bodies as domestic tribunals and sporting clubs to bodies and persons in the private sphere. Murphy J in particular noted:

> "When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often by described as public rights and their exercise as that of public power. Such public power must be exercised bona fide, for the purposes for which it was conferred and with due regard to the persons affected by its exercise."[84]

The decision in *Forbes* therefore confirms that the theoretical potential for the judiciary to accept a broader conception of "public" or "governmental" power. This remains the case despite the fact that a number of cases have specifically limited the potential of the *Datafin* decision. While it would be a great leap for the understanding of "public" power I have advocated in this article to be accepted without question by the courts, it is hoped that I have demonstrated that the potential can exist, and will continue to exist, for theory to be translated into practice.

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[84] id, p 275.

Part 5 Conclusion

Whether the courts would ever accept a broad understanding of "governmental" or "public" power as a workable test as I have advocated in this article is questionable. In addition, more work needs to be done on developing this idea of "public" power to determine exactly what it encompasses. I do not suggest that I have answered this question completely, but hope that I have offered some preliminary ideas and comments to develop this project further in the future. Suggestions such as this are sorely needed with respect to the legal position of privatised and corporatised bodies, as it is foreseeable that the further privatisation progresses in Australia in the future, the greater the likelihood is of the growth of a special branch of law regulating public utilities.[85] It will only be if the processes of corporatisation and privatisation are first theorised adequately that this branch of law will develop in a coherent and consistent manner.

In addition, it is also hoped that this article has demonstrated more generally how the work of Michel Foucault can be useful to the understanding of administrative law, and the development of alternative theories and perspectives. Although I have utilised Foucault's ideas to problematise the concept of the state within administrative law, many of Foucault's other theoretical ideas could be utilised to problematise other aspects of administrative law theory. One concept in particular that warrants further examination is that of "disciplinary power" and how this could enhance current theories of public administration and the prevalence of the concept of "new managerialism" within the public sector.

This process of critique and the creation of new theoretical perspectives concerning administrative law needs to be continued in the future, as it is only through such a process that the administrative law system in Australia will be able to adapt to societal changes and retain the radical potential that has been demonstrated in the past twenty years. It is hoped that this article and my preliminary suggestions for change have contributed to this process.

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85 "Some General Legal Aspects of Privatisation" (1987) 61 *Australian Law Journal* 267, at 268.