DISPUTING THE RESOLUTION: WHY THE AUSTRALIAN COMPLAINTS AUTHORITY WILL BE SUBJECT TO JUDICIAL REVIEW

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On 9 May 2017 the Treasurer announced the establishment of a new external dispute resolution (EDR) scheme for the Australian financial services industry.[1] Based on an Ombudsman model, the Australian Financial Complaints Authority (AFCA) will operate from 1 July 2018 as a single EDR scheme (a one-stop shop) to handle all financial complaints, including those involving superannuation.[2] Legislation establishing the new EDR framework was introduced in the Senate on 14 September 2017.[3]

One of many questions that arise in respect of the proposed new scheme is whether it will be subject to judicial review. This question is important given that a court exercising its right of judicial review would consider decisions of the scheme to determine if there has been:

- illegality;
- irrationality; or
- procedural impropriety.[4]

In this article the law in respect of judicial review and the breadth of its application in light of the decision in *R v Panel on Take-overs and Mergers; Ex parte Datafin plc*[5] (*Datafin*) will be reviewed. This article also considers whether the principle from *Datafin* applies in Australia and, more specifically, whether it will apply to the new EDR scheme.

The development of the *Datafin* principle

Historically, the principles of judicial review applied, as a matter of statutory interpretation, 'to enforce the will of the representative legislature'.[6] However, the law has developed significantly in this area, with the decision in *Datafin*[7] representing something of a landmark in that development.

The principle from *Datafin,* put simply, is that a decision of a private body that was not made in the exercise of a statutory power may be amenable to judicial review if the decision is, in a

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*[**Editorial comment:** Readers should note on 5 March 2018 the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Bill 2017 received Royal Assent. It is now the Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018 (Act No 13 of 2018). The text and footnotes which refer to the Bill and to proposed changes to the Corporations Act 2001 (Cth) should be read in light of the successful passage of the legislation.]*

practical sense, made in the performance of a 'public duty' or in the exercise of a power which has a 'public element'.[8]

Datafin was a significant decision in respect of judicial review in England. Before *Datafin* judicial review was available 'wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority'.[9]

However, in *R v Criminal Injuries Compensation Board; Ex parte Lain*[10] (*Lain*), the House of Lords extended those subject to judicial review beyond those exercising legislative power to those performing a public duty. In that case Lord Parker CJ commented:

> We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.[11]

The limitation that the availability of review did not extend to bodies of a private or domestic nature was stressed by Diplock LJ, who said that decisions of those bodies fall 'within the field of private contract and thus within the ordinary civil jurisdiction of the High Court supplemented where appropriate by its statutory jurisdiction under the Arbitration Acts'.[12]

In *Council of Civil Service Unions v Minister for the Civil Service*[13] (*CCSU*), the House of Lords applied *Lain* to extend the supervisory jurisdiction of the Court to the situation of a person exercising purely prerogative powers.

Prior to these decisions, 'the *source* of the power (whether in statute or the prerogative) was determinative of whether the power was public'.[14] However, these decisions, and particularly *Datafin*, made it clear that, at least in certain circumstances, regard can be had to the *nature* of the power to determine whether it is sufficiently public to attract judicial review.

In *Datafin*[15] the Court of Appeal clarified that statutory interpretation is not the only basis upon which the right to judicial review is enlivened. In determining whether the body making the decision being challenged is subject to judicial review, the Court noted that the source of the power is not the sole test to determine whether a body is subject to judicial review. That said, Lloyd J recognised that sometimes the source of the power is determinative. His Honour noted that if the source of the power is legislative then the body exercising the power will be subject to judicial review. At the other end of the scale, his Honour noted that, where the source of the power is contractual, the body exercising the power will not be subject to judicial review.

Justice Lloyd went on to state:

> 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 ... be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other [citation omitted].[16]

The effect of the decision is that a body exercising a public law function or whose decisions have public law consequences may be subject to judicial review, despite the source of its power not being legislative. At the other end of the scale, Lloyd J was equally satisfied that decisions based on contractual power would not be subject to judicial review.

In England, the principle from *Datafin* now seems well accepted. It has been approved by the House of Lords in *YL v Birmingham City Council*[17] and applied by the Court of Appeal.[18] Indeed, Spigelman CJ noted as early as 1999 that, in addition to the Panel on Take-overs and Mergers (which was the body considered in *Datafin*), other private bodies that had been found to exercise public power (so as to be amenable to review) included the Law Society, the Bar Council, the Advertising Standards Authority, a product accreditation committee in the pharmaceutical industry and a service provider regulatory committee of telecommunications companies.[19]

Accordingly, the courts in the United Kingdom have recognised at least an additional basis for judicial review — a common law basis which depends upon a consideration of the nature of the power being exercised and the functions of the body exercising it. Essentially now, rather than ensuring that the exercise of a power is consistent with the legislative intent, judicial review seeks to ensure that powers of a public nature are exercised properly, respecting principles of natural justice and avoiding abuse of power.[20]

Datafin does not mean that every decision of a private body exercising a possibly public power will be reviewable. In *R v Insurance Ombudsman; Ex parte Aegon Life Assurance Ltd*[21] (*Aegon Life*), the House of Lords considered the situation of a decision made by a private industry-based dispute resolution service. The principle Rose LJ distilled from *Datafin* can be summarised as follows:

> a body whose birth and constitution owed nothing to any exercise of government power may be subject to judicial review if it is woven into the fabric of public regulation or into a system of government control or if but for its existence a governmental body would assume control.[22]

In *Aegon Life* the Court found that, as there was no trace of government underpinning and because the jurisdiction of the Ombudsman was dependent upon a contractual relationship, decisions of the scheme were not susceptible to review.

The various factors identified by Rose LJ show that there is not one simple test that can be applied to determine if a particular decision may be the subject of judicial review. This highlights the issue identified by Spigelman CJ when he said:

> The characteristics of decisions by private bodies which render them of a sufficiently public character to attract judicial review have not been reduced to a simple test. Perhaps they cannot be. One can anticipate a series of factual situations arising for judicial decision which will clarify the basic principle.[23]

Datafin in Australia

Before turning to the question of the application of the *Datafin* principle to AFCA, the general question of whether *Datafin* applies in Australia must be considered.

While Kyrou J seems firm in his view that the *Datafin* principle applies at least in Victoria,[24] the reception of *Datafin* in Australia has been 'fairly cautious'.[25] Aronson[26] refers to the comments of Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[27] to the effect that the development of the common law in this area has been retarded by the operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Justice Finkelstein suggests more generally that the Australian courts have not been as 'liberated' as their English counterparts[28] and goes on to agree with the comments of Kirby J[29] and Aronson[30] and the view of Mantziaris[31] to the effect that the development of the common law has been retarded in this area.[32]

After providing a comprehensive summary of the relevant cases in Australia that have considered the application of the *Datafin* principle,[33] Kyrou J notes that *Datafin* has been referred to with apparent approval in a series of cases[34] and has been cited without any positive assertion about its applicability in others.[35]

A review of relevant Australian authorities in respect of *Datafin* with particular reference to the circumstances of EDR schemes is instructive. In *Minister for Local Government v South Sydney City Council*,[36] Spigelman CJ apparently accepted the application of the *Datafin* principle when His Honour said:

> In my opinion, the common law basis for the duty to accord procedural fairness is reflected in the cases which extend the duty to the exercise of prerogative powers … It is also the basis for the extension of the principles of judicial review to private bodies which make decisions of a public character.[37]

In *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd and Julie Wong (No 2)*[38] (*Masu*) Shaw J commented that 'the preponderance of Australian authority indicates that [*Datafin*] is applicable in the country'[39] and went on to find that decisions of the Financial Industry Complaints Service were amenable to judicial review in accordance with the principle.

In *D'Souza v Royal Australian and New Zealand College of Psychiatrists*,[40] Ashley J held that a decision of the college was not reviewable. His Honour noted that *Datafin* has yet to receive endorsement by the High Court and that it has not been applied in Australia in circumstances where the relationship between the parties was contractual. In fact, Ashley J went so far as to say:

> In my opinion, the answer is that on the present state of Australian authority certiorari is not available in respect of a decision of a body whose powers derive only from private contract.[41]

This is of relevance to EDR schemes given the contractual nature of the jurisdiction of those schemes. Of course, a contractual source of power does not necessarily indicate a consensual submission to jurisdiction — Australian financial services licensees will be required to be a member of AFCA and so enter into a contractual relationship with that scheme.[42] So, while there is a contractual relationship, the jurisdictional basis cannot be said to be consensual.

In *Grocon Constructors Pty Ltd v Planit Joint Venture [No 2]*[43] (*Grocon*), Vickery J was satisfied that the Full Court had approved and applied *Datafin* and that the adjudicator's determinations in that case were amenable to certiorari because the adjudicator performed functions of a public nature. Justice Vickery specifically referred to *The State of Victoria v The Master Builders Association of Victoria*,[44] in which the Victorian Court of Appeal relied upon *CCSU* and *Datafin.*

However, in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[45] (*Chase*), the Full Court of the New South Wales Supreme Court considered *Grocon* and Basten JA disagreed that the Full Court of the Victorian Supreme Court had approved or applied *Datafin*. In fact, Basten JA (with whom Spigelman CJ agreed) suggested that there is an absence of authority in Australia as to whether *Datafin* applies and that the High Court had not yet supported the application of the principle.

Subsequently, in *CECA Institute Pty Ltd v Australian Council for Private Education and Training*,[46] Kyrou J took issue with Basten JA's obiter observations in *Chase* and noted that no Australian decision (before *Chase)* had cast doubt on the applicability of *Datafin* in

Australia. Justice Kyrou considered *State of Victoria v Master Builders' Association of Victoria*[47] to be sufficient authority for the applicability of the *Datafin* principle in Victoria.

The Victorian Court of Appeal had a further opportunity to consider the issue of the applicability of the principle in *Mickovski v Financial Ombudsman Service Ltd*[48] (*Mickovski*). However, the issue was not determined, with the Court stating:

> the clear implication of the High Court's decision in *Neat Domestic Trading Pty Ltd v AWB Ltd* and of the observations of Gummow and Kirby JJ in *Gould v Magarey* is that we should avoid making a decision about the application of *Datafin* unless and until it is necessary to do so. In this case, we do not consider that it is necessary to do so. For, assuming without deciding that *Datafin* has some operation in this country, we agree with the judge that it could not have applied in the circumstances of this case. Taken at its widest, it is doubtful that the principle has any application in relation to contractually based decisions and, even if it does, we agree with the judge that the public interest evident in having a mechanism for private dispute resolution of insurance claims of the kind mandated by s 912A is insufficient to sustain the conclusion that FOS was exercising a public duty or a function involving a public element in circumstances where FOS' jurisdiction was consensually invoked by the parties to a complaint.[49]

This case is a decision in respect of the Financial Ombudsman Service (FOS) — a current EDR scheme. The Court referred to the consensual invoking of FOS's jurisdiction and by referring to 'the parties' seems to suggest that both parties agreed to their dispute being considered by FOS. In fact, the licensee is required to be a member of FOS and it is then the member's customer that unilaterally decides whether FOS will consider the dispute. The jurisdiction is not consensually invoked by the parties as, for example, in the case of an arbitration agreement. This distinction is important for reasons discussed below.

Mickovski has been considered subsequently. In *Bilaczenko v Financial Ombudsman Service*[50] Mansfield J considered submissions that *Mickovski* was erroneously decided. His Honour held that the contentions did not present an arguable case as they did not address in any critical way the analysis of the Court in *Mickovski*.

In *Colonial Range v Victorian Building Authority*[51] Vickery J considered *Datafin* and relevant Australian authorities (including *Mickovski)* which had considered its application in Australia. His Honour came to the conclusion that he was not required in the particular case to decide whether the appointment of a surveyor fell within the *Datafin* principle or whether that principle was applicable in Australia. However, his Honour did comment that, since *Datafin,* the appointment of a surveyor may be open to judicial review and was 'not necessarily immune from such a process because it is a decision of a "private" body as opposed to that of a "public" body, or by reason that the decision in question was contractually based as opposed to being founded in a statute'.[52]

While it is true to say that the High Court has not yet delivered a definitive decision on the applicability of the *Datafin* principle in Australia, there are nonetheless a number of relevant decisions from that Court.

In *Forbes v New South Wales Trotting Club*[53] (*Forbes*), Murphy J, when considering a decision to exclude a patron made by a trotting club, noted:

> When rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be 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 is conferred and with due regard to the persons affected by its exercise. This generally requires that where such power is exercised against an individual, due process or natural justice must be observed.[54]

However, the decision in *Forbes* was made on the basis of proprietorial and contractual rights and thus the need to decide whether a more general right of judicial review was available was avoided.

In *Attorney-General (Cth)* v *Breckler*[55] Kirby J referred to *Datafin* with apparent approval. Again, however, the Court avoided a decision on the issue in finding that the relevant relationship in that case was contractual.

The issue was also raised in the High Court in *Neat Domestic Trading Pty Ltd v AWB Ltd*.[56] The majority in that case held that review was not available, as the relevant decision was not made under an enactment for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, in his dissenting judgment, Kirby J again cited *Datafin* with approval.

The *Datafin* principle is now well entrenched in England and has apparently been accepted as part of the law in Victoria.[57] While the High Court has not yet expressed a definitive view on the application of *Datafin,* and other courts have questioned whether it does apply, there does not appear to be any decision in the High Court or elsewhere in which it has been held that the principle does not apply.[58] Indeed, there are comments by Murphy J[59] and Kirby J[60] in the High Court suggesting support for the application of the principle. Ultimately, there is a strong basis for considering that the *Datafin* principle applies in Australia.

The remainder of this article proceeds on the basis that the principle from *Datafin* does apply in Australia.

The ambit of the application of *Datafin*

Assuming that *Datafin* does apply in Australia, it is important to determine when the power is in fact sufficiently 'public' to be reviewable.

Cane and McDonald suggested that the question is perhaps only answerable by normative stipulation and commented that 'a public function is one which *should* be considered public and *should* be subject to judicial review'.[61]

Such a normative stipulation is not particularly helpful. However, two tests can be distilled from approaches taken by the courts. These are the 'but for' test and the 'regulatory integration' test.

'But for' test

Simply stated, the 'but for' test suggests that a power will be public if it is exercised by a body carrying out a function which, if not exercised by that body, would be exercised by the government.

In *R v Disciplinary Committee of the Jockey Club; Ex parte His Highness the Aga Khan,*[62] (Jockey Club), Farquharson LJ[63] and Hoffman LJ[64] applied a 'but for' test to the effect of whether, in the absence of the non-government body exercising the power, the government would undertake the function. Campbell[65] suggests there may be some support for this approach from the comment of Donaldson MR in *Datafin* to the effect that:

> No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law.[66]

There are difficulties associated with such a test. It provides no criteria by which it can be determined if the government would in fact exercise the function. The test effectively requires judges to make a hypothetical decision about the government being willing to act before it makes available the protection of judicial review. Not only will that not always be clear but also the situation may change depending on the political views of the government in power.[67] Perhaps because of these vagaries, the test has not been widely adopted.

Regulatory integration

The regulatory integration test considers the extent to which the function being considered operates as 'a key plank of a regulatory structure which includes government decision-makers'[68] or whether the function is underpinned by a statutory provision in such a way that the body exercising it can be said to be woven into the fabric of government.[69]

This test was referenced by Kyrou J, who was able to identify a number of features from English cases that suggest the presence or absence of the requisite public element on the basis of the integration with a governmental scheme as follows:[70]

- whether the body was constituted by an Act of Parliament or established by a public body;[71]
- whether there is statutory authority for the function of the private body;[72]
- the extent of control over the function of the private body by a public authority;[73]
- the extent to which the acts of the private body are enmeshed in the activities of a public body;[74]
- the degree of public funding of the function of the private body;[75]
- whether the function of the private body is subject to democratic accountability;[76]
- whether the private body, in performing the function, is subject to an obligation to act only in the public interest;[77]
- whether the function of the private body constitutes the provision of a public service;[78]
- whether the function of the private body constitutes the control of access to a place to which the public has a common law right of access;[79]
- whether the private body has stepped into the shoes of a public body, in the sense that it performs the same functions as had previously been performed by the public body to the same end and in substantially the same way;[80] and
- whether the sole source of the private body's power is a consensual submission to jurisdiction.[81]

The regulatory integration test was applied in *Masu*[82] to find that the decision of an EDR scheme was amenable to judicial review. In that case, Shaw J found that the following factors meant that the scheme was exercising a power of a public nature and so was subject to judicial review:

- the federal government was responsible for appointing a substantial proportion of the members of the board of FICS
- the federal government was involved in the appointment of two-thirds of any panel appointed by FICS to hear a complaint
- the scheme was constituted in compliance with the policy statement issued by the federal government
- that scheme was established under the umbrella of a regulation made by the Australian executive government under statute
- failure to comply with a decision of FICS could result in the federal government cancelling a licence and exposing the licensee to prosecution if it continued to conduct a business.[83]

Given the identified shortcomings of the 'but for' test and the lack of any obvious shortcoming with the application of the regulatory integration test, greater reliance upon the regulatory integration test is preferable.

Conclusion on the ambit of *Datafin*

Ultimately, even on the assumption that *Datafin* applies in Australia, it is not entirely clear in which circumstances it will apply to allow judicial review. The difficulty associated with determining its application was perhaps best summarised by Scott Baker LJ in *R (Tucker) v Director General of the National Crime Squad*:

> The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met. There are some cases that fall at or near the boundary where the court rather than saying the claim is not amenable to judicial review has expressed a reluctance to intervene in the absence of very exceptional circumstances … The starting point, as it seems to me, is that there is no single test or criterion by which the question can be determined.[84]

Application of *Datafin* to AFCA

In the previous section the ambit of the *Datafin* principle was considered. Whether AFCA will be subject to judicial review on the basis of *Datafin* can now be considered. To determine that question, it is necessary to consider the characteristics of the new scheme.

From the government's consultation paper and the exposure draft of the supporting legislation, the essential elements of the new scheme can be summarised as follows:

- AFCA will be a single dispute resolution scheme handling all disputes arising in the financial industry, replacing FOS, the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT).[85]
- AFCA will be based on an Ombudsman model and will be established by industry as a company limited by guarantee.[86]
- The new scheme will operate under a co-regulatory framework. This means that, while the AFCA board will make its own decisions regarding funding, staffing and dispute resolution processes, it must comply with legislative and regulatory requirements,[87] directions[88] and mandatory referral requirements.[89]
- While most operational aspects of AFCA will be based on private law (contractual) arrangements, some compulsory powers will be provided in respect of superannuation disputes.[90]
- AFCA may be authorised by the Minister and all financial firms and regulated superannuation firms must be members.[91]
- The constitution of AFCA must include a provision enabling the Minister to appoint the Chair and fewer than half of the directors of AFCA within the first six months of its operation.[92]

In considering whether AFCA will be subject to judicial review (on the basis of the *Datafin* principle), it is useful to consider more carefully the nature of those schemes, taking into account the principles set out above as identified in *Masu*[93] and by Kyrou J.[94]

The *Masu* approach

First, in respect of the *Masu* points:

- The Minister may appoint the Chair and half of the directors of AFCA in the first six months.[95]
- The government will not be involved in the appointment of Ombudsmen or panel members who determine disputes.
- AFCA must be constituted in compliance with the requirements for authorisation.[96]
- AFCA will be authorised by the Minister under the *Corporations Act 2001* (Cth).[97]
- Failure to comply with a decision of the EDR schemes must be reported to the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), or the Commissioner of Taxation.[98]

The Kyrou approach

In respect of Kyrou J's distilled principles, factors counting against AFCA being subject to judicial review include the fact that AFCA will not be constituted by an Act of Parliament or established by a public body, will receive no public funding, will not be subject to broad democratic accountability and will not control access to any place. Moreover, the source of the scheme's power is, primarily, a contractual power, although whether the power is truly consensual is somewhat questionable given the statutory underpinning of the regulatory system.

On the other hand, factors in favour of AFCA being amenable to judicial review include the fact that it will have statutory recognition, will be authorised by the Minister, will have compulsory powers available for superannuation disputes[99] and will be subject to strengthened regulatory oversight by ASIC.[100] In essence AFCA will provide a public service and act only in the public interest to provide a dispute resolution service which, if not so provided, would leave consumers no choice but to have their disputes considered by the Court or relevant statutory-based tribunal.

The preponderance of these various factors suggest that AFCA will be subject to judicial review.

Contractual basis of jurisdiction

One specific issue raised above is that, traditionally, bodies exercising contractual jurisdiction are not subject to judicial review.[101] It has been argued that 'even if the principle in *Datafin* is accepted in Australia, it would not apply to the schemes as their jurisdiction is derived from private contract and they are not performing public functions'.[102]

The starting point in considering this issue is *Jockey Club*.[103] In that case, the Court of Appeal, in considered whether the Jockey Club was subject to judicial review, held that a body that did not owe its existence to the exercise of government power could nonetheless be subject to judicial review if it was woven into the fabric of public regulation or system of government control or regulation or if it was a surrogate organ of government.

However, the Court specifically excluded those bodies whose powers derived from contract. Indeed, Sir Thomas Bingham MR said:

> I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of Rules of Racing administered by the Jockey Club, there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, an

> injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case.[104]

Lord Justice Hoffman noted the potential conflict between the principle from *Datafin* to the effect that a private body may exercise public functions such as to be the subject of judicial review (considering the nature of the power) and the concept that a body with a contractual basis for jurisdiction cannot be the subject of review. He said:

> In *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302 this court decided that the National Greyhound Racing Club Ltd was not amenable to judicial review notwithstanding that it controlled the greater part of the dog racing business in much the same way as the Jockey Club controls horseracing. The club was held to be a purely domestic tribunal because the source of its power lay in contract and nothing else. The case was decided before *Reg v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815 and did not consider whether, notwithstanding the lack of any public source for its powers, the club might de facto be a surrogate organ of government. I would accept that, if this were the case, there might be a conflict between the principle laid down in *Ex parte Datafin Plc* and the actual decision in *Law's* case [1983] 1 WLR 1302 which required a re-examination of whether *Law's* case still governed the present case. I would also accept that a body such as the Take-over Panel or IMRO which exercises governmental powers is not any the less amenable to public law because it has contractual relations with its members. In my view, however, neither the National Greyhound Racing Club Ltd nor the Jockey Club is exercising governmental powers and therefore the decision in *Law's* case remains binding in this case.[105]

Hoffman LJ seemed to accept that a private (contractually based) body could be subject to review but that it would need to be a 'surrogate organ of government'. That said, His Lordship was not satisfied in that case that the Jockey Club could be said to exercise government powers.

In *Aegon Life*,[106] Rose LJ derived from the comments of Sir Thomas Bingham and Farquharson LJ in *Jockey Club* that 'judicial review should not be extended to a body whose powers derive from agreement of the parties and when effective private law remedies are available against the body'.[107] Rose LJ went on to comment:

> Furthermore, when Sir Thomas Bingham MR spoke of the Jockey Club not being 'woven into any system of governmental control' I do not accept that he was thereby indicating that such interweaving was in itself determinative. On the contrary a substantial part of his judgment and that of Farquharson LJ is devoted to the negative implications as to judicial review if the body's power was derived from consent. I do not accept that their judgments or that of Hoffmann LJ, or those of the members of the court in *ex parte Datafin*, can be construed as contemplating that such a body as the IOB, even if it became interwoven into a governmental system would be susceptible to judicial review.[108]

Lord Justice Rose therefore found that if the basis of the jurisdiction was contractual then even being woven into a governmental system did not subject the body to judicial review:

> In a nut shell, even if it can be said that it has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law and those decisions are not, save very remotely, supported by any public law sanction. In the light of all these factors, the IOB is not in my judgment a body susceptible to judicial review.[109]

This clear statement was followed in *R (Mooyer) v Personal Investment Authority Ombudsman Bureau*[110] (*Mooyer*) by Newman J. In respect of the voluntary jurisdiction of the Authority, Newman J concluded that:

> [the relevant body] is not exercising governmental powers and is providing a voluntary arbitration service and not governmental regulation of the industry;
>
> the case, far from being distinguishable from *Aegon Life*, is more clearly an example of an exercise of consensual jurisdiction, for the decision is not binding upon the claimant or any third party.[111]

Again, this is a relatively clear statement — a body exercising a consensual jurisdiction is not the subject of judicial review.

However, the position may not be quite as straightforward as it at first appears. While in the *Jockey Club* case the Court found that the Jockey Club was not subject to judicial review, Hoffman LJ noted that, if a body was exercising government powers, it would still be amendable to public law despite having contractual relations with its members.

Lord Justice Farquharson, in considering the issue as to whether a lack of genuine consensuality may affect the broader principle, said:

> Mr Kentridge has referred to the lack of reality of describing such a relationship as consensual. The fact is that if the applicant wished to race his horses in this country he had no choice but to submit to the club's jurisdiction. This may be true but nobody is obliged to race his horses in this country and it does not destroy the element of consensuality.[112]

But this concept of consensuality has a limit. For example, in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth; Ex parte Wachmann*[113] (*Wachmann*), it was submitted that the jurisdiction of the Chief Rabbi was exercised only in respect of those who chose to be a member of the United Hebrew Congregation — there was no obligation on anyone to be such a member.

Justice Simon Brown noted that private or domestic tribunals may be excluded from judicial review on the basis of consensually submitting to jurisdiction:

> As it seems to me, the exclusion from judicial review of those who consensually submit to some subordinate jurisdiction properly applies only to arbitrators or 'private or domestic tribunals:' see *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302. Certainly I know of no other bodies held exempt from judicial review on this particular ground. Perhaps, however, it is artificial to regard this as a wholly distinct ground; perhaps rather it shades into consideration of whether the body in question is fulfilling an essentially public duty and its decision is one having public law consequences.[114]

In these comments Simon Brown J found not just that domestic or private tribunals with consensual jurisdiction may be excluded from judicial review but also that the issue of consensuality may not be a separate ground but may be one consideration in respect of the question as to whether a body is of a sufficiently public nature so as to satisfy the *Datafin* test.

Ultimately, and importantly, Simon Brown J rejected the strict application of the contractual argument in this case and said a person pursuing a vocation had no choice but to accept the jurisdiction. This therefore meant that a decision of the Chief Rabbi could be subject to judicial review. In so doing, Simon Brown J effectively found that a lack of true consensuality meant that the 'contractual' basis for exclusion from judicial review did not apply.

This was not an issue in either *Aegon* or *Mooyer*, as in both of those cases the parties subject to the jurisdiction genuinely chose to be members of the scheme for commercial or competitive reasons. There was no statutory or regulatory requirement to be a member.

In Australia, in respect of AFCA, it is submitted that the position is different from those considered in *Aegon* or *Mooyer* and is more akin to *Wachmann*. First, bodies the subject of the jurisdiction of the EDR scheme do not voluntarily choose to be members of a scheme — there will be a legislative requirement that they submit themselves to a scheme's jurisdiction.[115] This is a significant inroad into the suggestion that the jurisdiction is consensual. If it is the nature of the power being exercised that determines whether a body is subject to judicial review (*Datafin*) and if a private (contractually based) body may be

subject to judicial review (Hoffman LJ in *Jockey Club)* then this would be a strong factor in finding that EDR schemes are subject to review. Their members do not subject themselves to the jurisdiction consensually but, rather, pursuant to legislative requirement.[116]

Secondly, while Farquharson LJ stated in *Jockey Club* that a person had a choice whether to join and that they were not obliged to race horses, there appears to be a limit to such a concept. Clearly, Simon Brown J did not accept that in respect of the 'choice' to be a rabbi in *Wachmann.* In fact, Simon Brown J commented:

> So far as the Bar and universities are concerned, once the exclusive visitorial jurisdiction has been invoked and exhausted, the court can review the visitor's decision; it does not decline such review on the footing that those aggrieved chose rather than were compelled to go to the Bar or university.[117]

There is a clear parallel with those pursuing financial services activities. The fact that such entities (or those that operate them) choose to pursue a financial services licence rather than being compelled to do so should not mean that judicial review is not available to them.

It is submitted that there is also a clear distinction in respect of those that choose to pursue a sport or pastime such as racing and so submit themselves to a jurisdiction compared with those pursuing a vocation (as a rabbi in *Wachmann)* or profession (as alluded to by Simon Brown J) who, by nature of pursuing that vocation or profession, are required to submit to a jurisdiction.

However, the view of the Court of Appeal in *Mickovski* cannot be overlooked. In that case the Court commented:

> The [FOS's] power over its members is ... still, despite the Act, solely derived from contract and it simply cannot be said that it exercises government functions. In a nut shell, even if it can be said that it has now been woven into a governmental system, the source of its power is still contractual, its decisions are of an arbitrative nature in private law and those decisions are not, save very remotely, supported by any public law sanction. In the light of all these factors, the [FOS] is not in my judgment a body susceptible to judicial review.[118]

These comments are, of course, obiter dicta, with the Court specifically noting that it would not decide whether *Datafin* applied in the case. Moreover, the comments were made after limited analysis of the law in the area and with reference to a very limited number of relevant authorities. The limited reasoning of the Court is not persuasive and, it is submitted, is somewhat inconsistent in one respect.

On the one hand, the Court did not regard as significant the difference between the optional nature of the scheme in *R v Insurance Ombudsman Bureau* and the mandated requirement of membership of EDR schemes. So the consensual aspect did not appear to be significant at that point.

On the other hand, the Court considered that the 'ultimately determinative' issue was the fact that the public does not have to use FOS and could instead sue insurers in the Court. That is, submission to the jurisdiction was consensual (derived from contract) and so excluded from the operation of *Datafin.*

This approach does not seem consistent in that it does not consider consensuality to be significant in respect of the firm's membership of the scheme but does consider consensuality to be significant in respect of use of the scheme by the consumer.

Moreover, even though there seemed to be some concession that FOS may have been woven into a government system, it was argued that the fact that the power was derived

from contract and that there was only a remote public law sanction supporting decisions meant that FOS was not subject to judicial review. A number of issues arising from this can be addressed:

- Membership of an ASIC approved EDR scheme, and therefore submission to its jurisdiction, is not consensual — it is currently mandated by federal legislation[119] and will be in the future.[120] As Malbon comments with reference to FOS as an EDR scheme, 'thus, the Australian government provides a mandatory system of access to justice in the consumer marketplace — a system that is fully funded by industry'.[121] Instead, while the jurisdiction is contractual, it is not truly consensual and so decisions may well be subject to judicial review if the decision-maker is enmeshed in the regulatory/government system.[122]
- The other aspect of consensuality touched on by the Court was in respect of the 'choice' by consumers to use the EDR service as opposed to suing in court. With respect, this does not truly reflect reality in that using the courts to resolve disputes is not a genuine alternative for many, if not most, consumers. The barriers to using the courts were made clear in the recent *Access to Justice Arrangements* report published by the Australian Productivity Commission.[123] The Commission noted the factors that caused unnecessary cost and delay in using the courts[124] and the insufficient loss to an individual to justify the cost and noted instead the practical and proportional alternative offered by an Ombudsman scheme.[125] The vast majority of those consumers do not have a real choice to use the courts — only AFCA will be available.

  Of course, consumers also have a choice as to whether to accept the final decision of a scheme and such a decision only becomes binding if the consumer so chooses.[126] Again, however, in most cases such a 'choice' is illusory, as the alternative for the consumer in pursuing their rights elsewhere (through the courts or relevant tribunal) is, for the same reasons stated above, not a genuine option.

- The Court of Appeal in *Mickovski* also suggested that any public law sanction in support of the EDR scheme is very remote. That is not necessarily so. ASIC Regulatory Guide 165 makes it clear that, if the licensee ceases to be a member of an EDR scheme, it must inform ASIC,[127] in which case the licensee is not meeting its licence obligations and may face action from ASIC.[128] Moreover, the failure of an Australian Financial Services Licensee to be a member of an EDR schemes as required by s 912A of the *Corporations Act 2001* (Cth) renders the licensee subject to suspension or cancellation of the licence[129] and potentially for prosecution for a general contravention of the Act.[130]

Taking all of these factors into account, and given the brief analysis in *Mickovski* leading to the obiter comments, it is submitted that, if the issue was properly ventilated and considered by a court in the future, *Mickovski* would not serve as a strong authority for EDR schemes not being subject to judicial review and may not be followed.

In essence, it is submitted that the Court was correct in *Masu* in finding that the EDR scheme was subject to review, on both a legal and a conceptual basis.

Judicial review: conclusion

On the basis of the foregoing analysis, it seems likely that when provided with the opportunity the High Court will decide that the *Datafin* principle applies in Australia to extend judicial review to bodies of a public nature or which perform public functions.

Whether AFCA would be subject to judicial review in accordance with that principle is a more difficult question. Certainly on the principles identified in *Masu* and by Kyrou J the schemes

seem sufficiently 'public' to be subject to *Datafin*. Moreover, in the only case in which the issue has been directly considered, the Court held that one of the schemes was in fact subject to judicial review.[131]

However, the fact that the jurisdiction of AFCA will be based on contract creates some doubt, particularly in light of the English authorities considered above. But, while the jurisdiction may be based in contract, it is not truly consensual given that financial services firms are required by regulation to submit themselves to the jurisdiction of an EDR scheme.[132] Thereafter the firm has no choice as to whether the customer invokes the jurisdiction of the relevant EDR scheme. In this regard, the situation is vastly different to that of a purely consensual contractual jurisdiction, such as in the case of arbitration pursuant to an arbitration agreement. Some doubt may also arise given the position of the consumer who is free to choose to pursue their dispute other than through the EDR schemes and may even choose not to accept the final decision. While recognising these issues, which could be the subject of further specific research, it is submitted that they are not sufficient to alter the conclusion that EDR schemes are likely be found to be subject to judicial review.

The jurisdiction of AFCA in respect of dispute resolution can also be contrasted 'with the activities of Jockey Clubs and rabbis, which are areas that governments have rarely sought to regulate'.[133] Indeed, in recent significant reports, reference has been made to the significant role EDR schemes play in the justice system (filling 'an important gap in the civil justice landscape, providing a mechanism for resolving low value disputes'[134]) and in the financial sector (with 'the importance of continuing to have an adequate consumer dispute resolution system'[135] noted). Such a significant dispute resolution jurisdiction that would otherwise need to be provided by some form of government intervention is more likely to be subject to judicial review.

Given the significant public function proposed for AFCA, it is submitted that the courts, when the question arises, are likely to find that AFCA is in fact subject to judicial review.

Endnotes

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4 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935; *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815.
5 [1987] 1 QB 815.
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7 [1987] 1 QB 815.
8 As stated by Kyrou J in *CECA Institute Pty Ltd v Australian Council for Private Education and Training* (2010) 245 FLR 86 and subsequently by Emilios Kyrou in 'Judicial Review of Decisions of Non-governmental Bodies Exercising Governmental Powers: Is *Datafin* Part of Australian Law?' (2012) 86 *Australian Law Journal* 20.
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13 [1984] 3 All ER 935.
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17 [2007] 3 WLR 112.

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19 James Jacob Spigelman, 'Foundations of Administrative Law' (1999) 4 *Judicial Review* 69, 78.
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31 C Mantziaris, '"Wrong Turn" on the Public/Private Distinction: *Neat Domestic Trading Pty Ltd'* (2003) 14 *Public Law Review* 197.
32 Finkelstein, above n 28, 6.
33 Kyrou, above n 8.
34 *Norths Ltd v McCaughan Dyson Capel Cure Ltd* (1998) 12 ACLR 739; *Typing Centre of New South Wales v Toose* (unreported, Supreme Court of NSW, Matthews J, 15 December 1988); *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121; *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120; *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759; *Whitehead v Griffith University* [2003] 1 Qd R 220.
35 *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242; *Hall v University of New South Wales* [2003] NSWSC 669.
36 (2002) 55 NSWLR 381.
37 Ibid [7].
38 [2004] NSWSC 829.
39 Ibid 830.
40 (2005) 12 VR 42.
41 Ibid [112].
42 Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Bill 2017, s 32.
43 (2009) 26 VR 172.
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54 (1979) 143 CLR 242, 275.
55 (1999) 197 CLR 83.
56 (2003) 216 CLR 277.
57 *Grocon Constructors Pty Ltd v Planit Joint Venture [No 2]* (2009) 26 VR 172; *The State of Victoria v The Master Builders Association of Victoria* [1995] 2 VR 121; *CECA Institute Pty Ltd v Australian Council for Private Education and Training* (2010) 245 FLR 86.
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59 *Forbes v New South Wales Trotting Club* (1979) 143 CLR 242, 275.
60 *Attorney General (Cth) v Breckler* (1999) 197 CLR 83; *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.
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69 Campbell, above n 14.
70 Kyrou, above n 8, 31–2.
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72 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, [65]; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, [35]; *Aston Cantlow Parochial Church Council v Wallbank* [2004] 1 AC 546, [12]; *YL v Birmingham City Council* [2007] 3 WLR 112, [167].
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79 *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, [30], [33], [34].
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81 *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, [41].
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87 Ibid, proposed s 1051(5) of the *Corporations Act 2001* (Cth).
88 Ibid, proposed s 1052C of the *Corporations Act 2001* (Cth).
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98 Ibid, proposed s 1052E of the *Corporations Act 2001* (Cth).
99 Exposure Draft, Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (Cth) ss 1053–1054; Exposure Draft Explanatory Material, Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (Cth) 17–26.
100 Exposure Draft, Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (Cth) ss 1049–1051; Exposure Draft Explanatory Material, Treasury Laws Amendment (External Dispute Resolution) Bill 2017 (Cth) 6.
101 *R v Insurance Ombudsman Bureau; Ex parte Aegon Life Assurance Ltd* [1994] CLC 88; *R (Mooyer) v Personal Investment Authority Ombudsman Bureau* [2001] EWHC Admin 247.
102 Denise McGill, 'Are the Financial Services External Complaints Resolution Schemes Subject to Judicial Review?' (2008) 26 *Companies and Securities Law Journal* 438, 439.
103 [1993] 1 WLR 909.
104 Ibid 924.
105 Ibid 932.
106 [1994] CLC 88.
107 Ibid 93.
108 Ibid 94.
109 [1994] CLC 88.
110 [2001] EWHC Admin 247.
111 Ibid [12].
112 Ibid 928.
113 [1992] 1 WLR 1036.
114 Ibid 1041.
115 Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth) sch 1.
116 In this regard, note the view by Ken Adams to the effect that, largely on the basis of *Aegon*, the General Insurance Claims Review Panel was not subject to judicial view. That panel was an early incarnation of the current EDR schemes. However, membership of, and submission to the jurisdiction of, the panel was in fact

purely voluntary (as Adams himself notes). This in itself represents a clear distinction to the current EDR schemes. Ken Adams, 'Judicial Review of Claims Review Panel's Decisions' (1997) 8 *Insurance Law Journal* 1.

117 [1992] 1 WLR 1036, 1040.

118 [2012] VSCA 185, [33].

119 *Corporations Act 2001* (Cth) ss 912A(2), 1017G(2); *National Consumer Credit Protection Act 2009* (Cth) s 47.

120 Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Bill 2017 (Cth) sch 1.

121 Justin Malbon, 'Access to Justice for Small Amount Claims in the Consumer Marketplace: Lessons From Australia' in Michael Trebilcock, Anthony Duggan and Lorne Sossin (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 328.

122 *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd and Julie Wong (No 2)* [2004] NSWSC 829.

123 Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Report No 72, September 2014) vol 1.

124 Ibid 385.

125 Ibid 315.

126 Paragraph 8.7 FOS terms of reference and CIOL Rule 25.4. This approach reflects the approach set out in Department of the Treasury, *Key Practices for Industry Based Customer Dispute Resolution* (Canberra, February 2015).

127 Australian Securities and Investments Commission, *Licensing: Internal and External Dispute Resolution* (Regulatory Guide 165, February 2018) para 165.162.

128 Ibid, para 165.165.

129 *Corporations Act 2001* (Cth) s 915C.

130 *Corporations Act 2001* (Cth) s 1311.

131 *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd and Julie Wong (No 2)* [2004] NSWSC 829.

132 *Corporations Regulations 2001* (Cth) cll 7.6.02(3), 7.9.77(3); *National Consumer Credit Protection Regulations 2010* (Cth) cl 10(3).

133 Finkelstein, above n 28, 8.

134 Productivity Commission, above n 123, 312.

135 Australian Government, *Financial System Inquiry Final Report* (Canberra, November 2014) 194.