Datafin: endgame

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R v Panel on Take-overs and Mergers; Ex parte Datafin Plc[1] ('*Datafin*') is a member of that club of rare cases that have become eponymous in the description of a principle of law. Calling it the '*Datafin* principle' tends to cast it as an add-on to orthodox administrative law principles. My ultimate proposition is that the *Datafin* principle is not only orthodox but also inevitable. I will try to make good that proposition along the way to making some broader observations about the principle.

First, I will summarise the principle and sketch out what I think must be its scope. I will then refer to a cross-section of cases in Australia that have had cause to refer to it and which have offered some perspective as to whether the principle can or should be said to apply in Australia. I hope to then put those observations into a degree of historical context, manifested in the broadly understood division between public law and private law.

Much has been written about that division, and much of that has been critical. My sketch in this article will not pretend to do the scholarship justice. Rather, I shall skip through some of the key manifestations of this distinction and then offer a brief historical perspective on the contingency of the identity of wielders of public power. I will do this by reference to the scholarship of PP Craig.

Finally, I hope to use this contingency as a platform for concluding that not only should the *Datafin* principle be recognised as a principle of Australian law but also it is rather difficult to see how it cannot be. As a matter of principle, at least, its recognition is inevitable. Its scope of application is another matter.

The *Datafin* principle

Datafin concerned the functions of the Panel of Take-overs and Mergers. Sir John Donaldson MR described this as a 'truly remarkable body'.[2] It was an unincorporated association without legal personality. It had 12 members, appointed by and representative of various associations of industry: banking, insurance, finance, accountants and more. It had no statutory, prerogative or common law powers. It had no contractual relationship with any part of the financial market, over which it had a function of regulation.

This function of regulation lay in its role of 'devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions'.[3]

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1 [1987] QB 815.

2 *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815, 824.

3 Ibid 826.

It performed, in essence, a role of self-regulation in the UK financial market. The introduction to the code explained the process of investigating an alleged breach of the code by the panel — then, on a finding of a breach, the recourse to private reprimand or public censure or, in serious cases, further action 'designed to deprive the offender temporarily or permanently of his ability to enjoy the facilities of the securities markets'. There was the facility of appeal to its appeal panel. Standing behind its findings was the possibility of the Department of Trade and Industry, or the stock exchange, acting on its findings to penalise an offender. The effective regulatory power of the panel over participants in the UK financial market was tremendous.

Datafin plc and another company, Prudential-Bache, made a complaint to the panel about two other companies having, contrary to the code, 'acted in concert' — a suitably British euphemism for where entities agree to cooperate actively to obtain shares in a company to obtain control of the company. The panel dismissed the complaint. Datafin and Prudential-Bache sought judicial review.

The Master of the Rolls examined, briefly, the unique history of the panel, which performed a function regulated by statute in just about every other comparable market. This history was essentially of the City of London regulating itself by professional opinion. The increasingly understood need for intervention to prevent fraud caused government to reinforce the institutions capable of doing so but also building on what was already there. This included accepting the self-regulatory role of the panel. As the Court then put it:

> The issue is thus whether the historic supervisory jurisdiction of the Queen's courts extends to such a body discharging such functions, including some which are quasi-judicial in their nature, as part of such a system.[4]

The clearest statement in answer to this question appears in the judgment of Lloyd LJ, who described the bodies that were the object of the question not as 'private' bodies but by reference to the source of their power, falling between the two extremes of statute or subordinate legislation on the one hand and contractual on the other. As he put it:

> 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.[5]

4 Ibid 836.
5 Ibid 847.

He rejected the proposition that the sole test of whether a body is subject to judicial review is the source of its power. Where a source of power was purely contractual, such as that of a private arbitral tribunal, this was historically regarded as disqualifying the function as being characterised by a public duty.[6] Otherwise, however, while the source of power was a relevant part of the inquiry, ultimately:

> [t]he distinction must lie in the nature of the duty imposed, whether expressly or by implication. If the duty is a public duty, then the body in question is subject to public law.[7]

So the application of the principle to a body whose power is sourced not in statute or contract (nor, I would add, the prerogative) requires ascertaining whether a duty is a public duty.

In *Datafin*, the application was refused. The Court observed that the panel combined the functions of legislator, court interpreting the panel's legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches of the code.[8] It held that there was little scope for intervention on the basis that it had promulgated rules that were ultra vires or on the interpretation of its own rules. The panel had a discretion to dispense with operation of the rules. As to its disciplinary function, there was an internal right of appeal, and Sir John Donaldson MR observed that, if the allegation was of a breach of its rules, the Court would be reluctant to intervene absent any credible allegation of lack of bona fides. He concluded:

> The only circumstances in which I would anticipate the use of the remedies of certiorari and mandamus would be in the event, which I hope is unthinkable, of the panel acting in breach of the rules of natural justice — in other words, unfairly.[9]

So, notwithstanding the amenability of the panel to judicial review in the exercise of its public functions, the scope of intervention was narrow.

Peeking ahead, we can already see the basis of ambivalence for application of the principle in Australia. The Take-overs and Mergers Panel was an unincorporated association whose powers were without statutory or contractual foundation. It was a product of an organic development of governance in the City of London that can be traced back to the rise of the livery companies from the 12th century, more commonly known as the guilds. The guilds had extraordinary powers of governance in the City and still have a role today. The panel in *Datafin* does not appear to have been a creation of the old guilds themselves; but, as a creation of a group of trading and financial associations with a view to self-regulation, it stems from that tradition of governance.

6 *R v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864, 882 (Lord Parker CJ); *R v Industrial Court, Ex parte ASSET* [1965] 1 QB 377, 389 (Lord Parker CJ).
7 *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] QB 815, 848.
8 Ibid 841.
9 Ibid 842.

Australia's tradition of governance comes from the original grants of letter patent, imperial Acts introducing responsible government such as the *Australian Constitutions Act 1850* (Imp) and the ground zero of federation. Our starting point is different: it would not be surprising to find fewer instances providing conditions for the potential operation of the *Datafin* principle. We have a different historical tradition of governmentality. Having said that, Australia is not immune to the attractions of industry self-regulation.

Australian ambivalence

In 1988, *Datafin* was applied in the Supreme Court of New South Wales, in *Typing Centre of New South Wales v Toose & Others*[10] ('*Toose*'). The Advertising Standards Council ('ASC') had been established by charter in 1974 by the Media Council of Australia ('Media Council'), the Australian Association of National Advertisers and the Advertising Federation of Australia. Its functions related to the promotion, maintenance and improvement of standards and ethics in the advertising industry. It had the power to determine complaints of breaches of advertising standards, set out in various advertising codes promulgated by the Media Council. The Media Council had been established in 1967 and its membership included most of the commercial media companies in Australia.

The ASC had established procedures for determination of a complaint of a breach of advertising standards. If it upheld the complaint, it would bring the matter to the attention of the Media Council, which in turn could impose sanctions on any advertising agency. That could include fining the agency or even removing its accreditation. It would not sanction the advertisers themselves, but, in the event of a contravention, no media owner would accept the advertisement for publication because of their membership of the Media Council and obligation to comply with its rules. Because of the restrictive effect on competition that this scheme had, the Media Council obtained authorisations from the Trade Practices Commission.

In 1986, a detailed complaint was made about a press advertisement inserted by the Typing Centre of New South Wales ('Typing Centre'), a business college. The advertisement was said to be misleading in the extreme. The secretary of the ASC sent a copy of the complaint to the Typing Centre, which responded by rejecting the allegations in general terms. It did not attempt to answer the specific complaints. In 1987, the ASC upheld the complaint, holding that the advertisement was in breach of the clause of the Advertising Code of Ethics which provided that '[a]dvertisements must be truthful and shall not be misleading or deceptive'.

The Typing Centre sought to appeal and, for the first time, to respond to the specific complaints. The ASC declined to review its determination but said it would consider any further evidence submitted. The solicitors for the Typing Centre made a number of allegations of denial of procedural fairness in the original letter. The ASC did, in the event, agree to consider the matter afresh and once again upheld the complaint. The Typing Centre sought judicial review, complaining of a denial of natural justice.[11]

10 *Typing Centre of New South Wales v Toose & Others* (Supreme Court of New South Wales, Matthews J, No 25025 of 1988, 15 December 1988).

11 Ibid.

Whether the ASC was amenable to judicial review was squarely in issue. Its powers derived from neither statute nor contract. Matthews J of the Supreme Court of New South Wales, after reviewing Datafin, characterised the issue as being whether the ASC exercised public functions, or functions which have public consequences. She held:

> The answer, in my view, is overwhelmingly in the affirmative. The ASC has power, through its complaints procedures, to interpret and mould the various advertising Codes in precisely the same way as the courts can interpret and mould Acts of Parliament. This, to my mind, is a very public function indeed. And it goes further than this. Many provisions of the Codes, (including the one we are concerned with in this case), do little more than restate the existing law. In relation to these provisions, the ASC is, in effect, providing an alternative forum for dealing with matters which might otherwise need to be litigated in the courts. And all this in relation to people or organisations who need do no more than insert a single media advertisement in order to attract the ASC's jurisdiction.[12]

Her Honour went on to comment on the central role of advertising in a society dependent on a system of mass communication. However, she held that, on any view, the importance of advertising in the community was so self-evident that it was clear that the ASC must be treated as a public body and, in appropriate cases, subject to judicial review.[13] She found it was bound to apply the rules of natural justice.[14] In the event, she found that there was no breach of the rules of natural justice and found for the ASC.

Toose is one of a number of cases which, between 1988 and the early 2000s, effectively referred to *Datafin* with approval and assumed its operation in Australia, without interrogating whether or not the principle applied. Emilios Kyrou, a Justice of the Supreme Court of Victoria, undertook a most helpful review and analysis of these cases in an article published in the *Australian Law Journal* in 2012.[15] In addition to *Toose,* his Honour identified:

- *Norths Ltd v McCaughan Dyson Capel Cure Ltd,*[16] relating to the Australian Stock Exchange;
- *Victoria v Master Builders' Association of Victoria;*[17]
- *MBA Land Holdings Pty Ltd v Gungahlin Development Authority;*[18]
- *McClelland v Burning Palms Surf Life Saving Club;*[19] and
- *Whitehead v Griffith University.*[20]

12 Ibid 19 (Matthews J).
13 Ibid 20 (Matthews J).
14 Ibid 21 (Matthews J).
15 E Kyrou, 'Judicial Review of Decisions of Non-governmental Bodies Exercising Governmental Powers: Is *Datafin* Part of Australian Law?' (2012) 86 *Australian Law Journal* 20.
16 (1988) 12 ACLR 739.
17 [1995] 2 VR 121.
18 (2000) 206 FLR 120.
19 (2002) 191 ALR 759.
20 [2003] 1 Qd R 220.

In 2002, in *Minister for Local Government v South Sydney City Council*,[21] Spiegelman CJ expressed the view that the common law basis for the duty to accord procedural fairness was the basis for the extension of the principles of judicial review to private bodies that make decisions of a public character, citing *Datafin*.

It was on the basis of these cases that in the 2004 case of *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd [No 2]*[22] Shaw J of the Supreme Court of New South Wales concluded that *Datafin* was applicable in Australia and that decisions of the Financial Industry Complaints Service, a body incorporated under the *Corporations Act 2001* (Cth), were amenable to judicial review.

Shortly before this, in *NEAT Domestic Trading Pty Ltd v AWB Ltd*,[23] the High Court considered whether a decision of a private body, AWB (International) Ltd, was made under the *Wheat Marketing Act 1989* (Cth). This would determine justiciability of its decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act'). Under the Wheat Marketing Act, the Wheat Marketing Authority required the approval of AWB before giving consent to export wheat from Australia. Therefore, should AWB withhold its consent (which it did), it could curtail the powers of the WMA insofar as the WMA would be compelled, by the Wheat Marketing Act, to reject an application for the export of wheat.

McHugh, Hayne and Callinan JJ raised the question of 'whether public law remedies may be granted against private bodies'[24] but declined to resolve it. They ultimately found that decisions by the AWB were not made under an enactment for the purposes of the ADJR Act.[25]

Gleeson CJ preferred the view that the decision of AWB was made under an enactment but would have dismissed the application on its merits. He further said, however:

> While AWBI is not a statutory authority, it represents and pursues the interests of a large class of primary producers. It holds what amounts, in practical effect, to a virtual or at least potential statutory monopoly in the bulk export of what; a monopoly which is seen as being not only in the interests of wheat growers generally, but also in the national interest. To describe it as representing purely private interests is inaccurate. It exercises an effective veto over decisions of the statutory authority established to manage the export monopoly on wheat; or, in legal terms, it has the power to withhold approval which is a condition precedent to a decision in favour of an applicant for consent. Its conduct in the exercise of that power is taken outside the purview of the Trade Practices Act.[26]

Kirby J (in dissent) referred to *Datafin* in the context of 'whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law'.[27] His Honour then said in reference to *Datafin*:

21 (2002) 55 NSWLR 381 [7].
22 (2004) 50 ACSR 554.
23 (2003) 216 CLR 277.
24 (2003) 216 CLR 277 [49]–[50].
25 (2003) 216 CLR 277 [52]–[55].
26 (2003) 216 CLR 277 [27].
27 (2003) 216 CLR 277 [67].

> Whether or not the criterion of the exercise of 'public power' is sufficiently precise to be accepted as the basis for review of decisions under the common law, the observations about the nature of the power identified in cases such as *Forbes* and *Datafin* are helpful in analysing whether particular decisions are of an 'administrative character'.[28]

Kirby J identified what ultimately might be said to be the hard question in the potential application of *Datafin* in any contest — that is, what can be said to amount to public power where that question is not answered by reference to the power having a statutory or prerogative source. I will return to this question shortly.

In 2010, in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*,[29] the New South Wales Court of Appeal reviewed the authorities in Australia engaging with the *Datafin* principle. Basten JA concluded that there was an absence of authority in Australia that actually addressed whether *Datafin* applied.[30] In *CECA Institute Pty Ltd v Australian Council for Private Education & Training*,[31] published shortly after this, Kyrou J of the Supreme Court of Victoria acknowledged that most of the cases that had referred to *Datafin* with approval had done so in obiter but maintained that it had been the basis of relief in *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd [No 2]*.[32]

The article by Emilios Kyrou in the *Australian Law Journal* addresses these cases, and it is not necessary for me to recite them all here. I note the decision of the Supreme Court of South Australia in *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide*,[33] which concerned a failure by the Corporation of the City of Adelaide to renew a licence of a stall holder in the Adelaide Central Market. One ground of review was that the corporation had breached the rules of natural justice. Vanstone J held that the decision was made in the course of a conventional commercial relationship. She said:

> The mere fact that the power to contract is found in the LGA [Local Government Authority] does not mean that any decision taken relevant to a contract is amenable to judicial review. Not every decision taken by a statutory corporation pursuant to a general power to contract is liable to judicial review; only administrative decisions affecting rights, interests and legitimate expectations …[34]

She expressed the view that *Datafin* had not yet been accepted in Australia.[35] In doing so, she located that principle in the need to find a sufficient 'public element or flavour' to the decision,[36] which she considered that, in any event, did not exist in that matter.

Then, in 2012, the Victorian Court of Appeal in *Mickovski v Financial Ombudsman Service Ltd*[37] was faced with a submission that the decision-making of the Financial Ombudsman Service ('FOS') was amenable to judicial review on the basis of the *Datafin* principle. The

28 (2003) 216 CLR 277 [115], referring to *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242.
29 (2010) 78 NSWLR 393.
30 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 [81].
31 (2010) 30 VR 555.
32 (2004) 50 ACSR 554. See *CECA Institute Pty Ltd v Australian Council for Private Education & Training* (2010) 30 VR 555 [86].
33 (2011) 110 SASR 235.
34 Ibid [17].
35 Ibid [26], [30].
36 Ibid [22], citing *Hampshire County Council v Beer* [2004] 1 WLR 233, 247.
37 (2012) 36 VR 456.

FOS conducted an alternative dispute resolution system for the superannuation industry, on behalf of its members. It did so pursuant to a scheme approved by the Australian Securities and Investments Commission, pursuant to s 912A(1)(g) of the *Corporations Act 2001* (Cth). Mr Mickovski had lodged a complaint with the FOS about the rejection by Metlife of his claim for total and permanent disability benefits. On the submission of the application of the *Datafin* principle to the FOS, the Court said:

> Arguably, there is some force in those submissions. Putting aside doctrinal difficulties which it has been suggested could stand in the way of extending judicial review beyond the realms of statutory and prerogative decision making, the *Datafin* principle is appealing. In face of increasing privatisation of governmental functions in Australia, there is a need for the availability of judicial review in relation to a wider range of public and administrative functions. The *Datafin* principle offers a logical, if still to be perfected, approach towards the satisfaction of that requirement. There have also been a number of first instance decisions in which it has been held or suggested that the *Datafin* principle does apply in Australia, and indeed in the past there has been some limited recognition given to the principle in this court.
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> That said, however, 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.[38]

Finally, in the 2017 case of *L v South Australia*,[39] the Chief Justice reviewed the authorities to date on the application of *Datafin* in Australia, observing that the difficulty with the criteria for identifying that the body was exercising the necessary public function was that, in many cases, the result would point to the power having a statutory or prerogative source on the one hand or a contractual source on the other.[40] That is an unsurprising observation, given the Australian governmental tradition.

The Chief Justice also waded into the thicket of characterising public power for the purpose of the application of *Datafin*. He considered *Victoria v The Master Builders' Association of Victoria*, [41] where the Victorian Government had established a task force, being a non-statutory organisation directed 'to pursue remedial action against contractors who have engaged in collusive tendering on state government projects'. The task force could place contractors who did not respond satisfactorily to a letter setting out the terms of future engagement and inviting them to provide a statutory declaration denying involvement in collusive practices over the past six years. Eames J had held:

> [T]here can be no doubt that the state, in acting through the task force, is acting pursuant to a perceived public duty. The task force is applying the coercive force of the state, thus benefiting from the position of dominance in the industry which the state has and which no individual corporation, of whatever size, or any individual, possesses. In pursuing this course the state is undoubtedly seeking to address a matter of public importance. … Furthermore, the impact of the decisions of the task force upon public companies must have public law consequences, if only because the well-being of the corporate sector is related to the financial stability of the state.
>
> I conclude, therefore, that there is no impediment to this court reviewing the decisions …[42]

38 Ibid [31]–[32] (footnotes removed).
39 (2017) 129 SASC 180.
40 *L v South Australia* (2017) 129 SASC 180 [141]–[142] (Kourakis CJ, Parker and Doyle JJ agreeing).
41 [1995] 2 VR 121.
42 Ibid 164.

Kourakis CJ criticised this conclusion from the perspective of the nature of the power being exercised:

> With respect the decision of the Full Court in the MBA [Master Builders' Association] case appears to conflate the question of practical economic and social power with a legal power to affect existing rights and interests. As a result, it subjected the voluntary investigations of public servants in the Department of Justice and the communication of the results of those investigations to judicial review for legality even though they had not exercised any legal power in doing so. They were not acting in aid of an exercise of a true prerogative power. Nor were they engaging in any legal power like the power to contract, which they held in common with all persons. Nor did their conduct operate as a condition precedent to conferral of a legal right, privilege or power.[43]

This criticism strikes directly at conceptions of what can be characterised as public power. It raises legitimate questions as to its content by reference, in the first instance, to both the source and object of the power under consideration. Its reference to the need for a legal power to affect existing rights or interests brings into the mix the question of standing, which adds a further dimension to the issue.

Public power and the public–private divide

Let us come back, then, to the concern of Kirby J about the precision of the criterion of 'public power' as an obstacle to the implementation of *Datafin* and, it might be said, to its adoption. This problem is well recognised, and grappled with, in the UK, where the principle is accepted. In *R (Tucker) v Director General of the National Crime Squad*,[44] Scott Baker LJ said:

> 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.[45]

Unsurprisingly, Aronson et al devote considerable attention to the principle. Acknowledging the lack of precision of the test, they say:

> *Datafin* and its British progeny have propounded an admittedly indeterminate test, but we believe that this is part of the price that must inevitably be paid for recognising the changing shape of the state. Even identifying the state can sometimes present difficulties. *Datafin's* headline test (public function) looks beyond the decision-maker's identity (public or private) to its function (governmental). But as in *Datafin* itself, the English cases also look on occasion to whether the so-called private entity is in fact doing 'the

43 *L v South Australia* (2017) 129 SASC 180 [152] (Kourakis CJ, Parker and Doyle JJ agreeing).
44 [2003] ICR 599.
45 Ibid [13].

> government's' bidding in much the same way as 'the administration' itself. The doctrinal difficulties are somewhat lessened where the entity in question can be said to be in partnership with the government itself.[46]

So, let us move back to the tools we have to conceive of public power. Public power is a historical conception that helps define what is broadly and problematically described as the 'public–private law distinction'.

I expect that we all share fairly consistent understandings of the disciplines that fall within the spheres of public law and private law, respectively. When we phrase the distinction in terms of law, we are talking about the manifestations of an abstraction. These manifestations are usually expressed in terms of available causes of action, remedies and standing. The controversy about *Datafin* itself can be expressed as whether a non-governmental body is amenable to relief that takes the form of the old prerogative writs.

This is one example of what has been described as the 'interface' between public and private,[47] where there is some basis for challenging the accepted classification of a matter as public or private. There are other manifestations of this interface. There is, for example, a history of litigation that has attempted to impose liability in tort on account of the exercise of public powers. *Graham Barclay Oysters Pty Ltd v Ryan*[48] concerned a claim that extended to a local and state government for the contamination of oysters with faecal matter. As Gleeson CJ put it:

> Accepting that local government authorities, and State governments, have responsibilities for public health and safety, those responsibilities are owed to the public. Mr Ryan must establish that the State, and the Council, owed a duty of care to him, as a consumer of Wallis Lake oysters. If such a duty exists, then presumably a similar duty is owed to all consumers of all potentially contaminated food and, perhaps, to all person whose health and safety might be offered in consequence of governmental action or inaction. What is the content of the duty owed to Mr Ryan, or to oyster consumers? If it is not possible to answer that question with reasonable clarity, that may cast doubt on the existence of the duty.[49]

As we know, the Court held that no duty of care arose in that case.

Pyrenees Shire Council v Day[50] concerned a fire caused by a latent defect in a chimney, of which the local council had been aware. The council had advised the tenant of the time by letter but had not exercised its statutory powers to ensure compliance with the direction given in the letter. A majority of the High Court held the council liable, Gummow and Kirby JJ holding that the council had breached a duty of care owed to the tenants at the time of the fire. Gummow J noted the adage of the difference between public and private law, referring to the judgment of Dixon CJ in *South Australia v The Commonwealth*,[51] but added:

46 M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2001) [3.190] (footnotes removed).
47 E Rock, 'Resolving Conflicts at the Interface of Public and Private Law' (2020) 94 *Australian Law Journal* 381.
48 (2002) 211 CLR 540
49 Ibid [8] (Gleeson CJ).
50 (1998) 192 CLR 330.
51 (1962) 108 CLR 130.

> This is not to deny that the law of tort, with its concerns for compensation, deterrence and 'loss spreading', may bear directly upon the conduct of public administration. The established actions for breach of statutory duty and for misfeasance in public office counter any such general proposition. Again, significant questions of public law have been determined as issues in actions in tort, particularly in trespass.[52]

Most recently, of course, we have had the judgment of Bromberg J, currently on appeal to the Full Court of the Federal Court of Australia, in *Sharma v Minister for the Environment.*[53] Bromberg J found that the Minister owed a duty of care when considering whether to give a statutory approval for the extraction of coal from a coal mine, in relation to the avoidance of personal injury to the children applicants. I do not propose to analyse that decision here, but I note that one of the arguments that Bromberg J rejected was that to find a duty of care would be incoherent with administrative law principles, as it would be inconsistent with the limited role of the courts in supervising the legality of statutory decision-making.[54]

Other areas of the 'interface' between public and private creating a need to resolve potential incoherence are where conduct amounts to both a criminal offence and a civil wrong, and in the event of claims for misfeasance in public office, as already noted above.

Dr Ellen Rock has recently written an excellent article examining the various tools used to resolve the tensions arising at the interface. These include the doctrine against collateral attack, estoppel by record and the court's inherent power to stay proceedings.[55]

These various facilities, in context, tend to resolve the tension by putting in fence posts to maintain the public–private distinction and indicating the point at which the fence may not be crossed or by closely guarding the gate. This may be done, for example, by circumscribing the content of the duty of care held by a decision-maker or identifying criteria by reference to which collateral attack may be permitted.[56]

Datafin does not kick the fence down completely, either, as we can see from its refusal to enter the field of contractual relations. However, by focusing on the character of the function, it potentially cuts a much bigger hole in the fence than we are used to.

The inevitability of *Datafin*

Pluralist democratic theory

I share the view of Aronson et al that this particular hole in the fence is inevitable. The public–private divide is a product of a theory of government that developed in the 18th and 19th centuries. Dicey's Hobbesian conception of parliamentary sovereignty had a critical impact upon administrative law. I cannot do justice to this history here, but I do recommend the seminal work by PP Craig, *Public Law and Democracy in the United Kingdom and the*

52 Ibid 140.
53 *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560.
54 Ibid [419]–[427].
55 Rock (n 47).
56 See, eg, J*acobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568 [93] (Besanko J).

United States of America.[57] Dicey's conception, very summarily put, was one of representative democracy justifying the transferring of supreme power from the King to the Commons. He held to a belief in legislative monopoly in Parliament, assuming that:

> [t]he Commons did control the executive and that all significant governmental power was and should be directed through Parliament. The state was unitary, with all real public power being concentrated in the duly elected Parliament.[58]

This view of legislative monopoly had profound consequences for administrative law. As Craig describes it:

> It is apparent that the execution of the legislative will may require the grant of power to a minister or administrative agency. Herein lies the modern conceptual justification for non-constitutional review. It was designed to ensure that the sovereign will of Parliament was not transgressed by those to whom such grants of power were made. If authority had been delegated to a minister to perform certain tasks upon certain conditions, the courts' function was, in the event of challenge, to check that only those tasks were performed and only where the conditions were present. It there were defects on either level, the challenged decision would be declared null. For the courts not to have intervened would have been to accord a 'legislative' power to the minister or agency by allowing them authority in areas not specified by the real legislature, Parliament. The less well-known face of sovereignty, that of parliamentary monopoly, thus demanded an institution to police the boundaries which Parliament had stipulated. It was this frontier which the courts patrolled through non-constitutional review.[59]

Craig is at pains to explain that this was not how the judiciary originally conceived of judicial review, the prerogative writs existing in form much earlier than the advent of Dicey's theory of legislative monopoly. The writs existed to ensure the regular courts' dominion over inferior tribunals and to provide remedies for those illegally or unjustly treated. Moreover, privative clauses have always been construed creatively, in order to be got around. But gradually judicial review became framed in terms of giving effect to the will of Parliament.[60]

One further consequence of the parliamentary monopoly on public power was the need for a private right to obtain relief against the executive. Executive power was required to be kept within its boundaries. But the role of the courts in keeping these boundaries proceeded on the assumption that only those who had private law rights had access to those processes. As Craig describes it:

> The gateways to administrative law, whether they be natural justice, standing, or the ability to apply for relief, were barred to those who did not possess such rights. Courts acted on the assumption that they were simply settling an ordinary private dispute in contract, tort, etc., in which one of the litigants happened to be a public body. The sole judicial function was to delimit the ambit of private autonomy by demarcating the area in which the public body could legitimately operate.[61]

57 PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, 1990).
58 Ibid 20–1.
59 Ibid 21–2.
60 Ibid 22–3.
61 Ibid 27.

It followed that decisions relating to social welfare and licensing, for example, which do not rely on the traditional formulations of private rights, were excluded from judicial review. Moreover, limiting the scope of judicial review in this way denied any sense that its concern was with the legitimate ambit of the regulating legislation.[62]

The development of the pluralist theory of democracy in the 20th century threw down a fundamental challenge to this Diceyan vision. This theory recognised that legislation is made after negotiation with interest groups and also had an understanding that Parliament does not actually scrutinise the legislation it creates. Parliament is a far less coordinated public power than Dicey would have it. It is dominated by the executive. It is subject to a system of interest representation. It is a key understanding of the theory of pluralist democracy that other institutions and bodies exercise public power.

Craig explains that this theory challenges the Diceyan vision of legislative monopoly with empirical evidence:

> *Constitution*al conventions should be founded on some measure of empirical evidence. If our theoretical constructs depart too much from reality, they risk becoming at best empty vessels; at worst they serve as invalid premises for the development of more particular rules of conduct. Few can seriously maintain that the picture of power and legislative monopoly ascribed to Parliament accords with reality. A more accurate portrayal of our political system would highlight two themes, both of which have direct relevance to the issue of participation: the growth in the power of the executive, and the increasingly complex nature of public decision-making. The former undermines the ideal of parliamentary power, and thereby places the value of primary participation, in the form of the vote, in its true perspective. The latter challenges both the ideal of parliamentary power and the legislative monopoly of Parliament. In doing so, it raises the question of whether other forms of participation are warranted.[63]

Craig is an English scholar, and his work focuses on the evolution of institutions in the UK, but he describes the post-war growth of governmental agencies that do not adhere to the old departmental norm in a fashion that is recognisable enough in Australia.[64] He describes quangos and various fringe organisations but also the growth of government contracting, which has a substantial impact on policy-making.

From this idea of pluralist democracy, we can recognise the impact of corporatism, which has been defined as follows:

> Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non- competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.[65]

62 PP Craig, *Administrative Law* (Sweet & Maxwell, 2nd ed, 1989) 15.
63 Craig (n 57) 167–8.
64 Ibid 169.
65 PC Schmitter, 'Still the Century of Corporatism?' in PC Schmitter and G Lehmbruch (eds), *Trends toward Corporatist Intermediation* (SAGE, 1979) 13, quoted in Craig (n 57) 148.

The relevance of theories of pluralism and corporatism here is to recognise that the state is not unitary in any meaningful sense. What follows from this is that a unitary theory of the state and public power is insufficient to ensure *accountability* in public decision-making. The model recognises that public power is exercised by a diverse range of institutions and individuals.

One major consequence of the development of pluralist theory was that it did not support the notion that an affected private right was a precondition to challenging a decision on the basis that it was unauthorised — that is, the model has profound consequences for rules of standing, once it is understood that the focus is on the accountability for the exercise of public power and not the vindication of private rights against the executive.

That does not mean that rules of standing have been done away with. The facility of the relator action has endured, explained by Lord Wilberforce in *Gouriet v Union of Post Office Workers*.[66] That case identified the continuing need for a 'special interest'. Lord Denning had quite a different view.[67] So did Murphy J in *Onus v Alcoa*,[68] while the majority in that case granted standing on the basis of a 'special interest' on the part of the Aboriginal claimants.[69] Questions of standing continue to trouble, not least because of the risk of conflation of the public interest and governmental interests in the ameliorating facility of relator actions.[70]

The logic of pluralist theories of public power had further consequences. Under the Diceyan model, the answer to the question of against whom administrative remedies should be applied was easy: it was those bureaucratic bodies that stepped outside the boundaries allocated by Parliament. But once all the influences that play on the legislative processes came to be recognised, the issue was no longer one of enforcing private rights against the executive on the basis that the executive had exceeded the power granted to it. It began to extend to accountability for the exercise of public power. Craig observes, in consequence:

> It may be argued that any distinction between public and private law is impossible to draw, or more moderately, that which bodies should be subject to public law will have to be defined on an ad hoc basis.[71]

This understanding of public power immediately throws up a direct challenge to the logic of *not* accepting *Datafin* as a necessary principle of judicial review.

I have not, of course, been able to do the theories of pluralist democracy justice by any means. The point is that, while the available scope of *Datafin* in Australia will depend on our own contingencies of organisation of public power, there is nothing in post-Diceyan conceptions of public power that closes off its application. In other words, the historical importance of *Datafin* is that it represented a fundamental departure from a necessary consequence of the Diceyan theory of parliamentary monopoly on public power.

66 [1978] AC 435, 477.
67 Lord Denning, *The Discipline of Law* (Butterworths, 1979) 144.
68 (1981) 149 CLR 27, 44.
69 Ibid 37 (Gibbs CJ)
70 See, eg, *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 425–426 (McHugh J 449–450, Kirby J 475–476, Callinan J).
71 Craig (n 62) 29.

The effect of Kirk

The consequences of *Datafin* for Dicey's conception in English administrative law necessarily lay in non-constitutional judicial review, and they were expressed to do so. However, in Australia over the last 25 years, administrative law has been relentlessly constitutionalised. For present purposes, let me just refer to the now well-known statement of the High Court in *Kirk v Industrial Court of New South Wales*:

> There is but one common law of Australia[72]. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of *State executive and judicial power by persons and bodies other than that Court* would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'[73]. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.[74]

This passage quite deliberately leaves it open as to who or what in any given instance might be exercising state executive power. Its very logic — that there must not be islands of power immune from supervision and restraint, and that this is a consequence of a defining characteristic of state Supreme Courts — necessarily challenges principled resistance to the proposition that *Datafin* applies in Australia. *Datafin* is, at its essence, a case about the facility to challenge the lawfulness of the exercise of public power, no matter its source.

The content of the principle in Australia — what amounts to an exercise of public power — is more problematic. The cases that have grappled with the issue tend to rely on instinctive understandings of public power, as indeed did *Datafin*. However, the constitutionalised framework of judicial review in Australia would seem to require placing the question of content, being the nature of public power, on a defensible theoretical foundation. I will briefly try to illustrate my thinking, which is still somewhat formative and necessarily expressed at a high level of abstraction.

In any given case, the nature of the 'public power' in question will affect the type of error capable of being committed by a private body in the context of its esoteric function and the type of remedy that may then be available. In *Datafin*, the reviewable obligation of the panel when exercising its functions was held to be confined to the requirement that the panel give procedural fairness. The Court of Appeal contemplated, in this context, the possibilities of relief taking the forms of certiorari and mandamus.

The High Court has confirmed that the entrenched supervisory role of the Supreme Courts extends to the grant of mandamus.[75] Mandamus in the context of the *Datafin* principle raises the prospect of circumstances where a private body is found to have a duty to exercise a public function but has failed to exercise that function at all. In such a case, resolution of the

72 *Lipohar v R* (1999) 200 CLR 485, 505 [43].
73 (1957) 70 *Harvard Law Review* 953, 963.
74 (2010) 239 CLR 531 [99] (emphasis added).
75 *Public Service Association of South Australia v Industrial Relations Commission* (2012) 249 CLR 398 [62]–[63].

question of content would require identifying the public function that has gone unperformed. That identification determines precisely, in the context of the case, the scope of the court's supervisory jurisdiction. It thereby gives content to a defining characteristic of state Supreme Courts.

A properly developed, judicially accepted theory of public power that addresses the question of content, therefore, necessarily also addresses an aspect of that defining characteristic. To leave that constitutional conception to instinctive understandings of the nature of public power would, it seems to me, be unsatisfactory in the extreme.

Conclusion

Datafin itself was an instinctive, common law manifestation of pluralist democratic theory. In Australia, the constitutionalisation of administrative law, at both the federal and state levels, severs the historical relationship between administrative law and whatever might remain of the Diceyan conception of parliamentary monopoly on public power. This, it seems to me, likely demands the inevitability of accepting the *Datafin* principle in Australia.

Recognising this requires us to engage directly with the nature of public power. The cases show an instinctive tendency to assume that which pluralist democratic theory and its offshoots attempt to express. I would like to think that there is scope in Australia to develop, judicially, our understanding of public power with some degree of reference to contemporary, empirically based theoretical frameworks. Indeed, constitutional coherence might be thought to demand this, as our understanding of public power determines an aspect of a defining characteristic of our constitutionally guaranteed state Supreme Courts.