Decision of ex parte datafin plc analysis

A critical analysis of the manner in which the decision in *R v Panel on Takeovers and Mergers; Ex parte Datafin plc* [1987] 1 QB 815 is being dealt with under Australian law.

Introduction

The case of *Datafin* is an accepted element of public law in England; however Australian law is unclear to its applicability as courts reference the principle cautiously in the absence of a case pertaining substantive facts.

The *Datafin* principle provides that a decision-making body may be subject to judicial review whether it is exercises its power from statute or private contract. That is to say, both the source and the nature of the power being exercised are to be considered when determining if a body is amenable to judicial review. In Australia, the *Administrative Decisions (Judicial Review) Act 1977 (' ADJR Act')* provides a statutory right to judicial review however a common law right (which may exist under the *Datafin* principle) is yet to be decided.

Without a final decision from the High Court as to its applicability, the *Datafin* principle will continue to be dealt with tentatively on a case by case basis. However recent cases from lower and appellate courts indicate that the principle will most likely apply here as it does in England when a case with the relevant facts arises.

Current Position in Australian Law

There is no clear authority for the adoption of *Datafin* in Australia despite many decisions with reference to the principle. The closest the courts have

come to taking an authoritative position regarding *Datafin* is the High Court's ruling in *NEAT Domestic Training Pty Ltd v AWB Ltd* .[1]This case marked a ' paradigm shift' in the delivery of administrative governmental services from being almost purely derived from statute to a mixture of private and public bodies.[2]

In this case the High Court took an interpretation of *Datafin* to focus solely on the source of the power with no consideration to the power's possible administrative/public nature. However, the conclusion in *NEAT* was very much limited to unique facts of the case and did not intend to be taken as a response to the broader issue of whether *Datafin* applies in Australia (i. e. whether public law remedies such as judicial review can be granted against private bodies).

In this case, the improper exercise of discretionary power was argued by a wheat trader against the Australian Wheat Board (AWB). However since the AWB was a private body brought into effect by the Corporations Law (Vic), it was found that its power was not derived from the statute which *NEAT* was arguing under (the *Wheat Marketing Act 1989*). The AWB's decision-making power was therefore not subject to the *ADJR Act* which sets out a requirement that decisions must be made " under an enactment" in order to be amenable to judicial review.

Justice Kirby argued an in-depth and seemingly valid dissent in favour of adopting the *Datafin* principle to apply to the four: one majority decision. He raised the concern that if the wheat board was not amenable to judicial review it would essentially hold almost complete and unreviewable power

over Australia’s wheat export industry. Therefore, the interests of the nation (or an issue of public significance) are irrefutably affected by a private body; a point acknowledged but not expressly addressed by Gleeson CJ.

A conclusion can be drawn from *NEAT* that only the source and not the nature of the power is relevant when determining applicability of judicial review in Australia. This conclusion is alarming when considering the Commonwealth could effectively insulate itself from all legal and political accountability if each public decision-making body was privatised in a similar fashion to *AWB Ltd* .[3]

An example of this conclusion can be seen in *Griffith University v Tang,* [4]where a student excluded from enrolment in university failed in her request for judicial review due to the university not making their decision under an enactment. Despite the university being deemed a ‘ public’ decision-maker,[5]the judgements consider the nature of the university’s relationship to Tang to be voluntary (i. e. ‘ private’). Therefore the source of power element could not be satisfied removing the need for the court to consider the substantive nature of the power.[6]In reaching this decision, their Honours accepted the reverse possibility that a private decision-maker could be considered ‘ public’ and therefore amenable to judicial review.[7]

The main implication of the decision in *NEAT* is that courts have essentially been advised not to make a decision about the applicability of *Datafin* until it is absolutely necessary.[8]Evidence of this deferral to make a decision about the principle has the courts intentionally not mentioning it in judgements even when parties make extensive submissions on Datafin to base their

arguments. For example, the unanimous decision in the *Offshore Processing Case* [9]did not mention *Datafin* even once despite multiple submissions by both parties.

Gradual Acceptance of the *Datafin* Principle by Australian Courts

In *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd,* [10]a corporation which dealt with financial industry complaints was deemed susceptible to judicial review. Justice Shaw described the corporation as a ‘ public’ body, pointing to government involvement in its foundation and processes. Here it was held that the preponderance of authority in Australia indicates that *Datafin* is applicable, at least to companies administering external complaints in the finance industry.[11]

In contrast, the case of *Chase Oyster Bar v Hamo Industries* [12]allowed Basten JA to explore the applicability of *Datafin* where he concluded that the decision *Masu* and did not amount to authority of acceptance of the principle.[13]Prior to this 2010 decision, *Datafin* had been referred to in Australian law with ‘ apparent approval’.[14]

Regardless, the *Masu* decision provided a foundation for Kyrou J’s later decision in *CECA Institute Pty Ltd v Australian Council for Private Education and Training.* [15]In this case it was held that the *Datafin* principle may render a private body to be subject to judicial review if that body is performing a ‘ public duty’ or exercising a power with a ‘ public element’. Defining a ‘ public element’ of a decision, once described as “ question-begging”[16]can be reasonably objectively determined from extensive English case law.[17]In the circumstances of this case, a link to a ‘ public

element' could not be established and the matter was instead settled by private law.[18]

A similar but more recent judgement in *Mickovski v FOS* [19]also suggested that the *Datafin* principle applies to Australian law provided the necessary public element can be satisfied.[20]In this case, an argument was raised that a public element existed by way of requiring a mechanism for private dispute resolution. However Pagone J held that the *Datafin* test failed as the corporation did not exercise government functions and its power over its members was derived from contract (therefore only allowing private law remedies). In doing so, the judgement cited and affirmed Kyrou J's reasoning from *Masu.* [21]

Shortly after this decision, the *Australian Law Journal* published an article by Kyrou J examining *Datafin's* applicability to Australian law.[22]Justice Kyrou cited the *Mickovski* decision as an authority for the rule's acceptance. However since the paper was published, *Mickovski* was appealed.[23]In the appeal, although dismissed, Pagone J was overruled in that the *Datafin* principle did not apply to the facts considering there was no public law justification for the request of judicial review. The Court explained in its dismissal of the appeal that with increasing privatisation of various government functions comes the need for the availability of judicial review in relation to administrative and public functions.[24]At [31], it was said that the *Datafin* principle provides a ' logical', approach to satisfy that requirement.[25]Buchanan, Nettle JJA and Beach AJA went on to conclude that it is doubtful that even a wide interpretation of *Datafin* would be applicable to contract-based decisions.[26]Therefore, Kyrou's argument and

call for approval is not discredited and it appears likely that the *Datafin* test will be appropriate when the relevant facts and circumstances arise in future.

It is significant to the current position that *Datafin* has never been rejected in Australian courts. However cases exist which are unfavourable to its ' apparent approval' prior to *Chase* . In particular, in *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide* ,[27]it was specifically stated by Vanstone J in the Supreme Court of South Australia that *Datafin* " *has not yet been adopted in Australia* ".[28]At [30], her honour said " *within intermediate appellate courts there are, at best, conflicting views as to whether [Datafin] represents the common law of Australia* ".

Should *Datafin* Apply in Australian Law?

Writing extra-judicially, now-retired QC, Raymond Finkelstein stated that the courts' function in relation to administrative law and judicial review should be to " *ensure that all bodies – private or otherwise – that perform public functions do so in accordance with the law."* [29]

Senior University of NSW Professor, Mark Aronson hints at the applicability of *Datafin* in Australian law and argues that *" public power is increasingly exercised from places within the private sector, by non-government bodies, and according to rules found in management manuals rather than statute books. If judicial review is about the restraint of public power, it will need to confront these shifts in who exercises public power, and in the rules by which they exercise it."* [30]A similar sentiment was held by Kyrou J in his decision in *Masu* that *Datafin " represents a natural development in the*

evolution of the principles of judicial review... [It] is essential in enabling superior courts to continue to perform their vital role of protecting citizens from abuses in the exercise of powers which are governmental in nature". [31]

Since the *Datafin* principle has been adopted in Canada and New Zealand, there is also an argument supported by Kyrou J that on a constitutional level, Australia ' should be consistent with the law of other important common law jurisdictions'.[32]

The arguments put forward are not without criticism however. The evolution of private bodies administering administrative/public functions is considered by some to be a new area of law which requires fresh regulation rather than ' shoehorning' the issues to fit into *Datafin.* [33]This arguably explains why the principle is so reservedly discussed in judgements where the elements of *Datafin* frequently cannot be made out.

The granting of judicial review against a private body's excision of power which was neither statutory nor executive has occurred only once in Australia (in the case of *Masu*) *.* Most cases which reference *Datafin* do so in *obiter dicta* simply to raise overlaps with other areas of law which have more established remedies and boundaries than attempting to expand administrative law principles. That is not to say more than one area of law cannot co-exist with certainty.

Conclusion

Despite significant and extensive ‘ apparent approval’ of the *Datafin* principle, it is impossible to determine the validity of the rule in the absence of a High Court decision. However, the number of cases citing *Datafin* with favourable *obiter* appears to outweigh the number of cases which reference it with reservation.

Whilst the *obiter* of *NEAT* recognises *Datafin’s* applicability in Australian law going forward, the actual decision of the case lends authority against its adoption. Regardless, in the unlikely event that the *Datafin* principle is rejected, private decision-making bodies performing public and administrative functions will not be immune to judicial review. The increasing trend of government divestment of administrative functions to private bodies will simply be dealt with judicial independence, allowing natural justice to form a either more refined interpretation of the *Datafin* principle.

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