Introduction

The Administrative Review Council is to be commended for raising important questions about the structure and scope of judicial review in Australia and for revisiting the current formula for judicial review in the Administrative Decisions (Judicial Review) Act 1977 (Cth). One important issue to be considered is whether the formula allowing review of 'decisions...of an administrative character...made under an enactment...' remains viable.

Many believe the formula is inadequate or dated for various reasons. For example, it remains of uncertain application to many commercial decisions or those made under novel regulatory regimes such as those supervised by ASIC or the ASX.

I write to attach a draft article on judicial review of ASIC and stock exchange operating rules for the attention of the Council.

**Judicial review of decisions of private bodies - fn 48 – the Datafin case**

The draft article addresses the key uncertainties that surround possible applications for review of ASIC decisions under the new Market Integrity Rules and the decisions of the stock exchanges under their operating rules under the ADJR.

The article submits that, in the light of developments in administrative law including comparative global standards and the Datafin case in the UK in 1986, administrative decisions under the new market integrity rules, the listing rules and the rewritten operating rules are open to judicial review at common law and under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

It submits that the current jurisdictional formula of the ADJR Act hinders review of such decisions.

It concludes that the status of those decision might be clearer under a formula that allowed review of decisions made in the exercise of ‘public power’ (which is one approach suggested by the Council's paper).
**Question 5 ‘under an enactment’**

As mentioned, a potential growth area that should be considered by the Council will be judicial review of decisions made by ASIC under the new Market Integrity Rules written and administered by ASIC, and the continuing debate over the application of the ADJR to decisions of financial markets (stock exchanges) under their operating rules as required by the Corporations Act 2001 (Cth) and ‘not disallowed’ by the Minister.

**Question 7 - judicial review of decisions of private bodies**

The draft article examines stock exchanges (private bodies) exercising public powers under their operating rules, which are made privately but have the approval of the Minister under the out-of-date formula that they are ‘not disallowed’ by the Minister.

**In short**

This review gives the Administrative Review Council the chance to ensure that administrative review of administrative decisions apply to apply to administrative decisions of both private and public bodies.

The attached paper raises many issues, some of which may be too challenging for the present review. If so, the Administrative Review Council should adopt a forward process for researching and considering them in greater depth, in anticipation of the next cycle of review. Such a cycle is inevitable, because of the high likelihood – if not known fact – that these provisions will continue to be ineffective until a wider approach is taken and the more serious issues are addressed.

I trust that this submission will assist the Review and would be happy to further assist.

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Dr Paul Latimer  
Associate Professor
Synopsis

Major amendments to the Corporations Act 2001 (Cth) in force from 1 August 2010 have replaced financial market coregulation by the Australian Securities and Investments Commission (ASIC) (and its predecessors) and the stock exchanges – going back 40 years - with increased stock exchange regulation by ASIC alone. Under the authority of the Corporations Act 2001 (Cth), ASIC now makes and enforces market integrity rules for each of Australia’s stock exchanges. Breach of a market integrity rule has statutory significance because it may lead to a civil penalty offence for which the court may impose a fine. Market integrity rules have resulted in the rewriting and downsizing of the status of the former stock exchange market rules from co-regulatory rules to operating rules. As market operators, stock exchanges monitor and enforce compliance with their rules and to cooperate with ASIC in delivering market integrity.

This article examines the status in financial market regulation of the new market integrity rules and the revised stock exchange operating rules. This article submits that, in the light of developments in administrative law including comparative global standards and the Datafin case in the UK in 1986, administrative decisions under the new market integrity rules, the listing rules and the rewritten operating rules are open to judicial review at common law, and under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

It concludes that Chapmans’ case from 1994, on appeal 1996, which had held that the Administrative Decisions (Judicial Review) Act 1977 (Cth) did not apply to stock exchange rules, has now been superseded by the effect of the 2010 amendments which would authorise judicial review of market integrity rules and operating rules at common law and/or under ADJR.

I INTRODUCTION

The Commonwealth government through the Corporations Act 2001 (Cth) provides the statutory framework for stock exchanges\(^1\) to operate financial markets\(^2\) for financial services.\(^3\)

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\(^1\) ‘Stock exchange’. In this article, I use the generic and more familiar ‘stock exchange’ instead of the current Australian expression ‘licensed financial market’ or the holder of an ‘Australian market licence’ (Corporations Act 2001 (Cth) s 761A). In Australia, licensed financial markets include Australian Stock Exchange Ltd (ASX), ASX 24 (formerly Sydney Futures Exchange), Chi-X Australia (from 2011), Chicago Mercantile Exchange Inc, Eurex
The Australian Securities and Investments Commission (ASIC) is Australia’s regulator of financial markets. As an agency (delegate) of the Commonwealth government, ASIC exercises a governmental regulatory function in the public and national interest. It is accountable to government through its Minister (Minister for Financial Services and Superannuation) under the principles of ministerial responsibility. The primary regulation of stock exchanges is under the Corporations Act 2001 (Cth), including the new ASIC-drafted market integrity rules4 made under the authority of the Corporations Act 2001 (Cth) in 2010.5 This direct regulation of stock exchanges by ASIC has taken the place of the former ASIC/stock exchange coregulation, which had taken the place of the original and now discredited former stock exchange self-regulation.6 There is government interest and public interest/government role in its creation and effective operation.

Frankfurt AG, London Metal Exchange Ltd and National Stock Exchange of Australia Ltd. ASX holds two AMLs as a licensed financial market (Australian Stock Exchange, ASX 24) and there are 15 licensed financial markets, 18 exempt markets and 85 low volume markets. Some financial markets are ‘exempt’ from the need to have an AML (from ASIC under s 791C) <asic.gov.au> at 5 June 2011. These include exempt financial markets and low volume financial markets.

2 ‘Financial market’ such as ASX and ASX 24 is a market where ‘financial products’ are traded. These include financial investment’ and financial products which ‘manage financial risk’. A ‘financial market’ is defined in Corporations Act 2001 (Cth) s 767A as a ‘facility for trading ‘financial products’ (s 763A) which includes a ‘financial investment’ (s 763B) and ‘manages financial risk’ (s 763C). What is not a ‘financial market’ includes, for example, direct negotiations (s 767A(2)) and over-the-counter (OTC markets). A financial market must be licensed by ASIC under Corporations Act 2001 (Cth) s 791A. The Australian Securities Exchange has two financial market licences to operate the Australian Stock Exchange and ASX 24 (called the Sydney Futures Exchange until 1 August 2010). If the discussion is unique to ASX, I use ASX for Australian Securities Exchange.

3 ‘Financial services’ include providing financial product advice and dealing in financial products ( Corporations Act 2001 (Cth) s 766A). In this article I use the Australian expression ‘financial services regulation’ for what is called ‘securities regulation’ in many jurisdictions such as in China, India and the US.

4 In this article I follow ASIC practice to use ‘market integrity rule’ as a generic expression in low case, and in capitals when referring to specific market integrity rules, as in n 5 below. See, eg, ASIC, Market integrity rules <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Market%20integrity%20rules> at 5 June 2011.


For example, the ASX Market Rules on participants and representatives (s 3), relationship with clients and dealing for employees and related persons (s 7) and short selling – cash market products (s 19) are unchanged. Some of the market rules on trading obligations of trading participants (s 13) have been deleted (such as s 13.4 [prevention of manipulative trading] and s 13.5 [prohibition on wash trades, pre-arranged trades and dual trading – futures]).

6 Self-regulation was the traditional method of regulation from the time when stock exchanges were private clubs. Self-regulation means ‘self governance’ by a body such as a club formed by participants as a ‘self-regulatory organisation’ (SRO) or a ‘self governance organisation’.

Self-regulation means ‘self governance’ by a body such as a club formed by participants as a ‘self-regulatory organisation’ (SRO) or a ‘self governance organisation’. Self-regulation has the benefit of efficiency, expertise, industry knowledge and experience. It has flexibility and because it is ‘us’ (the industry) regulating, it can provide a quick response time.
The administrative role of the stock exchanges is to operate their financial markets. This includes the requirement under the Corporations Act 2001 (Cth) to write their own self-regulatory operating rules consisting of listing rules and operating rules - sometimes called ‘soft law’ and submitting these to ASIC for approval by the Minister (ie by the Commonwealth government). These government-approved rules are a pre-requisite for the licensing of a stock exchange (s 795B(1)(c)). The Corporations Act 2001 (Cth) imposes many statutory requirements such as that the operating rules will ‘ensure’ that the financial market is fair, orderly and transparent (s 795B(1)(c)). The stock exchange rules have third party status and are enforceable by court order on the application of ASIC, the stock exchange and any other person (Part III below). Because of their government functions in public law, the listing rules and operating rules are more than a matter of contract between parties due to their statutory status. As such, decisions under market integrity rules, and under the listing rules and operating rules are open to judicial review at common law under the Datafin principles and under the legislation considered below including arguably as an ‘enactment’ under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (Part III below).

Stock exchanges operate under three levels of regulation by rules – the Corporations Act 2001 (Cth), the ASIC market integrity rules (Part II (A)), their own listing rules and operating rules (Part II (2)) – and case law principles of contract etc. The market integrity rules take precedence over the listing rules and operating rules.11

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7 ‘Operating rules’ with reference to a financial market are defined in Corporations Act 2001 (Cth) s 761A to include listing rules and operating rules:

(b) of a financial market, or proposed financial market, means any rules (however described), including the market's listing rules (if any), that are made by the operator of the market, or contained in the operator's constitution, and that deal with:

(i) the activities or conduct of the market; or

(ii) the activities or conduct of persons in relation to the market...

In this article, I use the low case for the generic use of listing rules and operating rules; in the case of ASX Listing Rules and Operating Rules as a proper noun, I follow ASX practice and use capitals.

8 ‘Soft law’ includes codes of practice and codes of ethics binding by agreement or contract. ‘Business rules’ cover legislation, subordinate legislation, soft law material developed by government agencies, soft law materials developed by industry bodies and other non-government entities for coregulation and for self-regulation: Administrative Review Council, Administrative Accountability in Business Areas Subject to Complex and Specific Regulation (2008).

9 Griffith CJ in Hudnall Parker & Co Pty Ltd v Moorehead [1909] HCA 36; (1908) 8 CLR 330, 357 explained judicial review as ‘the power ... to decide controversies between ... subjects or between, [the Crown] and its subjects ... The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action’: approved by the Federal Court in Australian Pipeline Ltd v Alinta Ltd [2007] FCAFC 55, [79].


II AUSTRALIAN STOCK EXCHANGE REGULATION BY ASIC ALONE

A New Stock Exchange Regulation Under the ASIC Market Integrity Rules Made Under the Corporations Amendment (Financial Market Supervision) Act 2010 (Cth)

Stock exchanges, established by the industry, are the centre of Australia’s financial services statutory regulation. The original stock exchanges were set up as private clubs, and they wrote their own rules and procedures under what is today called self-regulation. Self-regulation does raise doubts about the independence and objectivity of regulating one’s buddies (business associates) with whom one has and wishes to maintain ongoing business relationships. Stock exchange self-regulation has operated for centuries until its shortcomings – such as non-disclosure, misconduct, insider trading, weak and inconsistent self-regulation - were highlighted by commissions of inquiry following downturns in the economic cycle following booms and busts. Reports included those released after the great depression12 and the Rae Report released after the Mining boom in the 1960s.13

The result of the Rae Report was that in 1970 the states set up the first generation co-regulation under the state Securities Industry Acts by the stock exchange with the state government Corporate Affairs Commissions.14 This required licensing of stock exchanges and the financial services industry by the state government Corporate Affairs Commissions (the ‘Minister’: state governments) and coregulation with the first government regulators, the then Corporate Affairs Commissions. This marked the end of stock exchanges as private bodies, and led to the path to Commonwealth government coregulation with the stock exchange by the former National Companies and Securities Commission (NCSC: 1982-1991), later replaced by the Australian Securities Commission (ASC: 1 January 1991-30 June 1998) and now ASIC (from 1 July 1998).15

The stock exchanges were and remain private bodies, now incorporated, established by the

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12 See, eg, Ferdinand Pecora, Wall Street Under Oath – the Story of Our Modern Money Changers (1939, reprinted 1973). The author was counsel for the United States Senate Committee on Banking and Currency in 1933-1934 in its investigation of stock exchange, banking and securities markets. This was the background to the Securities Act of 1933 (US) (the Truth in Securities Act) and the Securities Exchange Act of 1934 (US) (which established the SEC).


15 ‘Coregulation’ occurs when regulation is a mix of self-regulation by the industry (the regulated) and regulation by the commission (independent of government control). Coregulation includes supervision and enforcement of rules relating to market integrity. It is best summarised by the memorable words of former SEC Commissioner and later US Supreme Court Justice William O Douglas that ‘(t)he exchanges take the leadership with the Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used’: William O Douglas, Democracy and Finance (1940) 82. The working relationship I have in mind for coregulation is self-regulation by the stock exchange based upon its experience of the market under the watch of the commission.
industry but ‘integrated into a system of statutory regulation’\(^{16}\) under the *Corporations Act 2001 (Cth)*. ASX, as a market self-regulator, demutualised and listed on itself in 1997.\(^{17}\) Stock exchanges like ASX are for-profit companies with statutory obligations under their Australian Market Licences (AML) to monitor and supervise (operate) their markets. They exercise public power by virtue of the implied devolution of government power.\(^{18}\) The demutualisation legislation in 1997 included many checks and balances\(^{19}\) to help overcome concerns that ASX faced conflicts of interest – at least five - that it was a financial market, a commercial company aiming to make a profit, a financial market self-regulator, a company regulated by ASIC and a regulated company under the *Corporations Act 2001 (Cth)*. This led to the view that ASX would put its commercial interests ahead of its then statutory coregulation obligations.\(^{20}\)

The result of these five different and inconsistent roles of ASX were thought to affect Australia’s reputation in international financial markets and prompted the passing of the *Corporations Amendment (Financial Market Supervision) Act 2010 (Cth)* (‘2010 amendments’).\(^{21}\) The 2010 amendments were designed to transfer the coregulation from stock exchanges (financial market operators such as ASX and SFE [now ASX 24]) to ASIC alone. These changes were proposed in 2010 in part to ensure equal opportunity to potential new financial market entrants.\(^{22}\) The prospect of further developments after the Australian Competition and Consumer Commission (ACCC) in December 2010 cleared a proposed

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16 To borrow the words of Lord Hoffman in *R v Disciplinary Committee of the Jockey Club; ex parte Aga Khan* [1992] EWCA Civ 7, [81]; [1993] 1 WLR 909.

17 The ASX group was created by the merger of the Australian Stock Exchange and the Sydney Futures Exchange in 2006: <www.asx.com.au>. ASX in its *Annual Report* (2010) stated that its net profit for FY2010 was $332.6m, up 6.1% over the prior year.

18 *R v Panel on Take-overs and Mergers, Ex parte Datafin*, above n 10; also *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 262 (Murphy J), cited in *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; 216 CLR 277, [113], [111] respectively (Kirby J).

19 See, eg, licensee obligations (s 792A-792B); obligation to give information to ASIC regarding listed companies (s 792C); obligation to assist ASIC (s 792D); obligation to give ASIC access to the market (s 792E); obligation to submit an annual compliance report to ASIC (s 792F); jurisdiction of Minister (s 794A, 794B); ASIC can give directions to ASX for an orderly market (s 794D); limits on control of 15% (Part 7.4 Div 1).


21 The amendments passed the Senate on 11 March 2010, received royal assent on 25 March 2010, and commenced on 1 August 2010.

22 The minister gave in-principle approval in April 2010 to Chi-X as a new market operator ; Chi-X’s Australian Market Licence was published on 4 May 2011 <asic.gov.au>. Other possible AML applicants include AXE ECN Pty Ltd and Liquidnet Australia Pty Ltd: *ASIC Consultation – Overview of New Market Proposals*. 7
acquisition of ASX by the Singapore Exchange came to an end in 2011.\textsuperscript{23}

Under the 2010 amendments, ASIC has become a ‘whole-of-market’ and real-time supervisor of Australia’s domestic licensed markets. ASIC is now responsible for supervising trading activities by market participants on stock exchanges (licensed financial markets) and for supervising the conduct of persons in relation to domestic licensed financial markets.\textsuperscript{24} The 2010 amendments have reduced the role of stock exchanges from coregulation with ASIC to the operator of the financial market under their operating rules.\textsuperscript{25} They have removed the obligation on stock exchanges to supervise their markets, and have transferred regulation from the stock exchanges to ASIC.\textsuperscript{26} Matters which were formerly coregulated with ASIC under the market rules have now been split between the ASIC market integrity rules and the stock exchange operating rules. Though not government commissions like ASIC and APRA, stock exchanges have been given many statutory obligations by the Commonwealth government through ASIC including monitoring and enforcing compliance with the listing rules and operating rules.

ASIC market integrity rules may overcome perceptions of conflict of interest. Their introduction has moved the current coregulation of stock exchanges by stock exchange and commission to regulation by ASIC alone with the aim of streamlining and unifying supervision, enforcement and the supervision of trading.\textsuperscript{27}

**Market Integrity Rules**


\textsuperscript{24} ASIC, Consultation Paper 131, above n 5, 13.

\textsuperscript{25} In this article, I use Operating Rules (the earlier usage of ASX was Market Rule to 1 August 2010; before that Business Rule, as defined in Corporations Act s 761A). ‘Operating rule’ became the new umbrella for market rules and listing rules in the former Corporations Law, which carried forward the distinction between business rules and listing rules from the original Securities Industry Act of NSW in 1970 and equivalents, above n 14, passed during the hearings of the Rae Committee.


\textsuperscript{27} This alleged failure of self-regulation and coregulation with the 2010 amendments is just what the World Federation of Exchanges (WFE) pointed out could happen with the move to financial regulation by commissions.

There is a risk that exchanges will lose their power to regulate their markets, market participants and listed companies. Both exchanges and investors would be poorly served if such an outcome eventuality occurs. Virtually all exchanges believe that regulation is part of their brand, and that they should make every effort to maintain their regulatory authority. World Federation of Exchanges, Regulation of Markets Survey 2004 (with the collaboration of Roberta Karmel, 2005) \textsuperscript{26} <http://www.world-exchanges.org/files/statistics/excel/Regulation%20of%20markets%20-%20Survey%202004.pdf> at 4 June 2011.
The Corporations Act 2001 (Cth) s 798G now authorises ASIC to ‘make’ market integrity rules ‘by legislative instrument’ with respect to the conduct, persons and financial products of licensed markets under its new powers contained in the 2010 amendments. The ASIC market integrity rules apply to market operators (stock exchanges), market participants (brokers), other prescribed entities and financial products traded on the market. They are ‘instruments’ under the Legislative Instruments Act 2003 (Cth) as they are in a document which has the capacity to affect legal rights and obligations. They are not in the exempted instruments in the Act and the Legislative Instruments Regulations 2004 (Cth), and are registered under the Act on the Federal Register of Legislative Instruments.

ASIC ‘supervises’ compliance by Australia’s stock exchanges under Corporations Act 2001 (Cth) s 798F. The market integrity rules set the standard for stock exchange self-regulation by imposing a level of government regulation over the former self-regulation and independent rule-making of the stock exchanges which must now comply with ASIC-written ‘market integrity rules’. Some have been adopted and rewritten from former stock exchange market rules and/or business rules which in many cases had originally committed industry practice to writing. In response to the 2010 amendments, the revised operating rules of the stock exchanges (licensed financial markets) have been reduced from ‘market integrity’ to matters to do with the operation of the market.

The new ASIC market integrity rules have a stronger statutory basis than the former stock exchange market rules. Following the 2010 amendments, ASIC - rather than a private body

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28 Corporations Act 2001 (Cth) Part 7.2A (Supervision of financial markets: s 798F-798L). The proposed Market Integrity Rules were contained in ASIC Consultation Paper 131, above n 5. The Market Integrity Rules for ASX and SFE are largely based on the then Market Rules of ASX and the Business Rules of SFE which they have now replaced.

29 Corporations Act 2001 (Cth) s 798G. The Legislative Instruments Act provides for the publication, presentation to parliament for parliamentary scrutiny and sunsetting of Commonwealth delegated legislation. It substantially reenacted parts of the Acts Interpretation Act 1901 (Cth) which dealt with regulations and disallowable instruments and extended their operation to all legislative instruments.

30 Under Legislative Instruments Act 2003 (Cth) s 6 (Instruments declared not to be legislative instruments); Legislative Instruments Regulations 2004 (Cth).


Stock exchange operating rules are not on the register.

32 ASIC, ASIC/ASX Market Integrity Rules (ASX Markets) 2010 (Market Integrity Rule 1).

33 ‘Market integrity’ refers to compliance with rules which deal with the activities or conduct of stock exchanges (licensed financial markets), the activities or conduct of persons with respect to stock exchanges and the activities of persons in relation to financial products traded on stock exchanges (Corporations Act 2001 (Cth) s 798G). These build on the OED explanation of integrity referring to a situation which is unimpaired and uncorrupted, and where there is truth and fair dealing.
such as a stock exchange – has been given responsibility for supervising domestic financial markets, making market integrity rules and enforcing them.\textsuperscript{34} A stock exchange is now under a statutory obligation to comply with the market integrity rules (s 798H(1)(a)). Unlike breach of the former market rules, which was actionable in contract, breach of a market integrity rule now has statutory significance because it is now a civil penalty offence.\textsuperscript{35} Breach of market integrity rule may result in a civil penalty (s 1317G(1C)) and a compensation order (s 1317HB) on the application of ASIC, the corporation or ‘any other person who suffers damage’. A court can make a pecuniary penalty order for breach of a market integrity rule under s 1317G.

In addition to civil penalty proceedings, penalties include infringement notices and enforceable undertakings as an alternative to proceedings.\textsuperscript{36} This may involve payment of a penalty to the Commonwealth, or requiring a AFSL licensee to undertake or institute remedial measures (including education programs), accepting sanctions other than the payment of a penalty to the Commonwealth (including public censure, suspension for no more than six months from performing certain financial services in relation to a licensed market, or disgorgement of profits); and/or entering into a legally enforceable undertaking.\textsuperscript{37}

The stock exchanges’ listing rules have not been affected by the introduction of the market integrity rules, and the stock exchanges have retained their role of admitting entities to listing on their markets.\textsuperscript{38} These include technical and operational matters relating to trading on the markets and trading rules specific to their markets. The ASIC market integrity rules do not directly apply to matters covered by the listing rules. This article argues that stock exchange decisions under listing rules can give rise to dispute and appeals to judicial review such as in Chapmans’ case, discussed below.

\textsuperscript{34} Corporations Act 2001 (Cth) s 798G (make); s 798H, 798J (enforce); ASIC, Markets Disciplinary Panel (Consultation Paper 136, 2010); ASIC, Markets Disciplinary Panel (RG 216, 2010); ASIC, Markets Disciplinary Panel Practices and Procedures (RG225, 2011).

\textsuperscript{35} Corporations Act 2001 (Cth) s 1317E(1)(jaaa) (ss 798H(1) (complying with market integrity rules); see, eg, ASIC, Markets Disciplinary Panel), above n 34, RG 000.4.

\textsuperscript{36} Corporations Regulations 2001 (Cth) reg 7.2A.01, 7.2A.02, made under Corporations Act 2001 (Cth) s 798K. ASIC has set up the Markets Disciplinary Panel (MDP) to provide for peer review in the issuing of infringement notices. Failure to comply with an infringement notice may result in ASIC applying to the court for an enforcement order. This will give the courts an important role in enforcing compliance with the market integrity rules. Only courts - not a body like ASIC - can exercise judicial power under the Aust Constitution, so any binding judgments could be challenged in the courts.

The penalties which may be imposed through the MDP process are similar to the penalties which were available to the ASX Disciplinary Tribunal: ASIC, Markets Disciplinary Panel, above n 35, categorising breaches into three tiers of seriousness, with a pecuniary penalty of up to $1m for the most serious breaches. Penalties under an infringement notice must not exceed three-fifths of the maximum penalty provided in the rules (Corporations Act 2001 (Cth) s 798K(2)).

\textsuperscript{37} Above, n 34.

B Stock exchange regulation under its own listing rules and operating (market) rules

A stock exchange must apply to ASIC for a licence (an Australian Market Licence - AML) to operate a financial market. The application is processed by ASIC, and the decision to grant a licence is made by the Minister (Commonwealth government, under s 795B). In contrast to some the jurisdictions where the commission write the rules, stock exchanges in Australia must write their own rules as a statutory prerequisite to obtaining a licence. The rules are made up of listing rules (for listed entities – how listing can take place) and operating rules (formerly called market rules or business rules, setting out how trading can take place) with content specified by Corporations Act 2001 (Cth) s 793A. The Corporations Regulations 2001 (Cth) made under this section ‘prescribe’ the content of the rules, including the conduct of participants in relation to the licensed market with the objective of promoting honesty and fair practice. The operating rules must enable the stock exchange to operate a financial market which is fair, orderly and transparent in at least six areas – that there is market information, fair trading, supervision of participants, market supervision, market stability, and prompt and fair clearing and settlement. These are designed to help to correct potential market failure where the market does not allocate goods and services efficiently, leading to the failure of the market to deliver socially beneficial results. Long gone is the stock exchange as a privately self-regulating club accountable only to its members (owners).

Within the framework required by and authorised by the Corporations Act 2001 (Cth), stock exchanges operate under a network of contracts under the ultimate authority of ASIC – between brokers (participants) and the exchange (operating rules), and between listed entities and the exchange (listing rules). Australia’s former ASIC/stock exchange coregulation (in place

39 In the US, although each exchange is a self-regulating organisation, the Securities and Exchange Commission is authorised by order, rule or regulation to establish self-regulatory measures to ensure fair dealing and investor protection. It is authorised ‘to make such rules and regulations as may be necessary or appropriate’ to achieve this statutory object (Securities Exchange Act of 1934 s 23(a)(1)). Under s 6(b)(1) of the Securities Exchange Act of 1934, an exchange must be able to enforce compliance with the rules by its members.

In the UK, the FSA has a general rule-making power (Financial Services and Markets Act 2000 (UK) s 138 General rule-making power). The former Financial Services Act 1986 (UK) ss 47-56 gave the Secretary of State extensive rule-making powers in many areas including statements of principle, conduct of business, financial resources, cancellation, notification, indemnity, compensation, fidelity funds and unsolicited calls.


40 Detailed in Corporations Regulations 2001 (Cth) reg 7.2.07 (Content of licensed market’s operating rules) including arrangements to monitor the conduct and compliance of participants; reg 7.2.08 (content of licensed market’s written procedures. Like virtually all stock exchanges: 97% of 38 stock exchanges: World Federation of Exchanges, World Federation of Exchanges Regulation of Markets Survey 2004 (with the collaboration of Roberta Karmel, 2005) , 5


42 See, eg, Australian Law Reform Commission, Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC 95, 2002) [3.28].

43 The Corporations Act 2001 (Cth) uses the generic ‘operating rules’ for the stock exchange listing rules and the operating rules: above n 7.
until 2010) had introduced many government and commission checks and balances to ensure disclosure of and accountability in stock exchange self-regulation to ASIC under its authority as the ultimate law enforcer. Further, the Corporations Act 2001 (Cth) required the stock exchange to provide assistance to ASIC and to report certain coregulatory matters to it. Under their AMLs, the stock exchanges monitor, investigate and impose sanctions for breaches of their listing rules and operating rules. They have access to participants and, under their contracts with their participants, the stock exchanges can inspect their records, examine conduct and enforce compliance with their self-regulatory disclosure requirements.

The operating rules were redrafted after the 2010 amendments to remove the stock exchange coregulation with ASIC and to leave the operation with the stock exchange. As these have a governmental public role, adverse decisions under the market integrity rules will be reviewable at common law and arguably under the Administrative Decisions (Judicial Review) Act 1977 (Cth), as discussed below.

This devolution of government power from ASIC to the stock exchange recognises the public significance of the stock exchange. ASX can regulate (but not police) breach of its listing rules and operating rules, and can refer a breach to the ASX Disciplinary Tribunal, an entity set up by ASX. ASX decisions are subject to judicial review, as discussed in Part III.

44 See, eg, Corporations Act 2001 (Cth) s 792C, 792D, 792E, above n 19.


As the operator of its financial market, it is the duty of ASX to follow up any evidence of an uninformed market. ASX sends a formal ‘please explain’ letter demanding an explanation when it observes unusual share price or trading volume changes of a listed company and listed entities are expected to respond publicly. Gong examined the ASX stock market monitoring program, and found that some companies do release new information to the market when asked. Ning Gong, ‘Effectiveness and Market Reaction to the Stock Exchange’s Inquiry in Australia’ (2007) 34 Journal of Business Finance & Accounting 1141. Gong found that after the company’s reply is posted, the average trading volume and the bid-ask spread are reduced. Further, the share price is also stabilised with two exceptions - the price will continue to rally on average if the company releases only partial information when questioned after a significant price jump, and the downward price trend will be reversed if the company states that no new information could explain the decline. In addition, there are statistically significant, positive abnormal returns for the first five trading days, which are not conditional upon the replies firms give to the ASX inquiries. This is a strong example of coregulation in operation where ASX is able to work with ASIC in law enforcement. It would be better if the process was founded on the principles-based disclosure obligation recommended by this thesis.

46 The operating rules cover access to the market (section 01), products (section 02), trading rules (section 03), execution, quote display and reporting services (section 04), monitoring conduct and enforcing compliance (section 05), general rules (section 06), definitions and interpretation (section 07) and transitional services (section 08): ASX Operating Rules <http://www.asxgroup.com.au/asx-operating-rules-guidance-notes-and-waivers.htm> at 5 June 2011.

It is inconsistent with their statutory status and their operational function that the operating rules may be viewed on the web, but may not be printed and can only be purchased at a commercial price.

47 The ASX Disciplinary Tribunal can issue warnings, ‘please explain’ letters, and impose fines of up to $1m (increased from $250,000). It can delist the securities of an entity by suspending trading. There is a right of appeal from decisions of the ASX Disciplinary Tribunal and the courts.
1 The Listing Rules of a Stock Exchange

The listing rules regulate the entities which are listed on the stock exchange. They provide standards of conduct for entities on the financial markets. They aim for full corporate disclosure by setting out ‘rules for the listing of companies, rules designed to ensure an adequately informed market, rules to govern the orderly conduct of trading and settlement, and a limited number of additional rules to regulate companies’ activities.

The listing rules constitute part of the contract between the stock exchange and the listed company, described as a:

flexible set of guidelines for commercial people to be policed by commercial people. They are in the same category as guidelines or standards laid down by administrative bodies who are administering an Act of Parliament. These guidelines or standards are never intended to be inflexible rules, but rather principles to be administered and applied by an expert body in accordance with the prevailing ethos of those chosen to administer them.

ASX, for example, recognises that its ‘Listing Rules create obligations that are additional, and complementary, to common law obligations and statutory obligations’. Part of the contract is the obligation to comply with the listing rules. The listing rules have a public dimension because they are a pre-requisite to the Minister granting a stock exchange an Australian Market Licence (AML) under Corporations Act 2001 (Cth) s 795B(1)(c), discussed above. The only enforcement authority which the stock exchange has is contractual under the listing contract and the participant contract.

2 The Operating Rules of a Stock Exchange

48 Corporations Regulations 2001 (Cth) reg 7.2.07 states in para (g) that listing rules must include

‘(i) admitting an entity to the official list of the licensed market for the purpose of enabling financial products of the entity to be traded on the licensed market, and removing an entity from the official list; and

(ii) the activities or conduct of an entity that is included on the official list of the licensed market, including a description of the arrangements for the disciplining of the entity for a breach of the operating rules’.


50 Fire and All Risks Insurances Co Ltd v Pioneer Concrete Services Ltd (1986) 10 ACLR 760 per Young J, cited by, eg, the Court of Appeal in FAI Insurances Ltd v Pioneer Concrete Services Ltd (1986) 4 ACLC 698, 702; White v Shortall [2006] NSWSC 1379, [338].


The stock exchange operating rules were originally based on stock exchange usage, which they partly reduced to writing. They set out the rules for the operation of the financial markets and facilities, how those facilities and services are to operate and the roles of the parties. The operating rules set out the rights and obligations of the brokers (participants) in the financial markets. They are the rules about the mode of business which in view of the importance of financial markets will have public significance. For example, the ASX Operating (formerly Market) Rules regulate the relationship between ASX as the market operator and its participants (brokers). They set out qualifications for membership and how trading may take place on ASX.

After the 2010 amendments, the role of stock exchanges is to monitor the conduct of participants, including real-time surveillance to detect breaches of rules. Australia is one of the few jurisdictions which gives full statutory reinforcement of the stock exchange's continuous disclosure rules, administers trading halts on the exchange to release information and centralises the disclosure of information to the market.

ASX drafted and continues to draft under the 2010 amendments its own operating rules (listing rules, market rules), clearing rules and settlement rules, which are regulated by ASIC as the supervisor of ASX compliance with cooperation by the stock exchanges. ASIC does not have an initiating role to draft operating rules as it is not formally authorised to draft or to require the adoption of rules. In contrast, the SEC has power to abrogate and amend SRO rules.

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53 ‘Broker’. In this article, I use ‘broker’ in the everyday sense for a financial services intermediary (middleman, retailer, adviser) including a stock exchange participant. The correct technical description is financial services intermediary (which includes financial planners and superannuation consultants).

Persons carrying on ‘financial services business’ (Corporations Act 2001 (Cth) s 761A) which provides a financial service (s766A) must have an Australian financial services licence (AFSL) from ASIC under s 911A. In addition, licensees transacting on a stock exchange such as ASX apply to ASX for ‘membership’ to become an ASX participant to access the ASX. Only then can they apply to ASIC for authorisation by means of an AFSL licence condition to use the word ‘stockbroker’ or ‘sharebroker’. Not all intermediaries are participants and brokers (such as financial planners and superannuation consultants). If the discussion is specific to AFSLs, I use ‘licensee’ or AFSL. If the discussion is specific to ASX participants, I use ‘participant’. If the discussion is generic, I use ‘broker’.

54 Described in Canliffe-Owen v Teather & Greenwood [1967] 3 All ER 561, 574 as rules and regulations as to its members and as to us mode of business; applied, eg, Lac Minerals Ltd v International Corona Resources Ltd [1989] 2 SCR 574.


56 Other illegal activity that may impact on ASX’s markets includes market manipulation, insider trading and front running.


58 The SEC in the US can make rules in the public interest to protect investors, and ‘may relieve any self-regulatory organization of any responsibility under this title to enforce compliance with any specified provision of this title or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member’ (Securities Exchange Act of...
A stock exchange can change its rules (s 793D). Indirectly, ASIC controls rules as it advises the Minister to ‘not disallow’ rules. After approval, ASIC retains the power to disallow rule changes, as under the Corporations Act 2001 (Cth) it is to be notified of amendments to rules by way of rescission, alteration or addition. The operating rules, written by licensed market, are ‘not disallowed’ by Minister (government).  

Stock exchanges like ASX are not responsible for dictating operational behaviour by listed companies, but the listing rules do specify what listed companies can do on their licensed financial market. ASIC has set out what is expected of the stock exchanges’ operation of their financial markets when they are licensed by the Minister.  

3 Listing Rules and Operating Rules are Contractual but the Stock Exchange is a Public Body Exercising a Government Role, Subject to Regulation

A pre-requisite for an AML issued by the Minister (the Commonwealth government) is ‘adequate’ listing rules and operating rules to ensure that the financial market is ‘fair, orderly and transparent’ (s 795B(1)(a)). The operating rules of a licensed financial market enable the exchange to conduct real-time and post-trade surveillance. They have effect as a contract under seal – a deed – between the market licensee and those who are allowed to participate in the market under the listing rules, and between a participant in the market and each other participant (Corporations Act 2001 (Cth) s 793B).  

The stock exchange’s authority as operator (not regulator) of its financial market comes from its contract with its listed entities and with its participants within the statutory framework of its Australian Market Licence issued by ASIC under Corporations Act 2001 (Cth). A participant is under the contractual obligation to comply with the operating (market) rules. A listed entity is under a contractual obligation - the ‘listing agreement’ - to comply with the listing rules which comes from acceptance of listing by the stock exchange. This is a ‘highly unusual contract’ which gives the stock exchange power to change the rules and to suspend

1934 s 19(g)(2)).


59 Corporations Act 2001 (Cth) ss 793D – 793E. For example, nineteen notices of amendments to business rules and listing requirements were given to the former National Companies and Securities Commission (NCSC) in 1989-1990: NCSC, Eleventh Annual Report and Financial Statements (1989-1990) 44. The Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Corporate Practices and the Rights of Shareholders (the Lavarch Report, 1991) recommended that the Attorney-General disallow alterations to the Listing Rules under the predecessor of Corporations Act 2001 (Cth) s 793E which are not expressed in a language and style which both facilitates clear interpretation and increases the ability to enforce the rules in court ( Recommendation 13).


61 97% of 36 stock exchanges: World Federation of Exchanges, above n 40, 5.


63 Peta Spender, ‘The Legal Relationship Between the Australian Stock Exchange and Listed Companies’
trading so long as it is ‘within the contemplation of the parties when the contract was made, having regard to the nature and circumstances of the contract’.

Virtually all stock exchanges enforce their rules by fines, or bans or suspensions of members. A World Federation of Exchanges (WFE) survey showed that 80% of stock exchanges do monitor and enforce conduct of business rules. By way of enforcement of this contract, the court may grant an injunction to a shareholder in the exercise of its ordinary equitable jurisdiction to restrain a threatened breach of contract. Or a stakeholder may approach the court for judicial review of a stock exchange decision.

III JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

UNDER STOCK EXCHANGE RULES


1 Judicial Review - Introduction

The leading financial markets are global, highly competitive and operate around the clock, with responsive regulation, sometimes principles-based, including accountability of administration with judicial review of stock exchange decisions. This is the global standard for Australian financial services regulation to aspire to.

This part of the article examines the availability of judicial review of stock exchange decisions under administrative law at common law, under the Constitution s 75(v) and under the Judiciary Act 1903 (Cth) s 39B. It examines some idiosyncrasies of Australian administrative law case law under the Administrative Decisions (Judicial Review) Act 1977 (Cth), and recommends harmonisation of some Australian case law under the Administrative Decisions (Judicial Review) Act 1977 (Cth) to meet the global financial regulation standards such as those of IOSCO, the European Convention and some comparative financial services


65 World Federation of Exchanges, above n 40, 5.

66 World Federation of Exchanges, above n 40, 8.


The argument based on Repco Ltd v Bartdon Pty Ltd [1981] VR 1 and Designbuild Australia Pty Ltd v Endeavour Resources Ltd (1980) 5 ACLR 610 that a direction under the then Securities Industry Act 1980 (Cth) and State Codes s 42 (now Corporations Act 2001 (Cth) s 793C) can only be given to a person under an obligation to observe the rules was rejected in FAI Insurances Ltd v Pioneer Concrete Services Ltd (1986) 4 ACLC 698.
regulation. Australia has international expectations to uphold, and in the words of Spigelman CJ:

Australia is an active participant, especially in the context of the G20, in the international exchanges which are directed at enhancing the global financial system both with respect to prudential requirements and further regulation of the financial sector on a globally harmonious basis.68

Current case law under the Administrative Decisions (Judicial Review) Act 1977 (Cth) limits judicial review of stock exchange decisions. This article argues that there would have to be compelling justification for such limitation of judicial review as the High Court has confirmed the importance of and the protected nature of its supervisory jurisdiction. It is arguable that its injunctive jurisdiction is so entrenched as to prevent legislative attempts to oust its jurisdiction.69

2 Judicial Review – Prerogative Writs at Common Law, Constitutional Judicial Review 75(v) and Judicial Review Under the Judiciary Act s 39B

Administrative action is of course subject to the legal process. At the preliminary stages of administrative review there may be the possibility of internal review by a superior officer and official scrutiny methods such as those by the Ombudsman and/or by the Financial Ombudsman Service (discussed below). Remedial action may be possible by action by the relevant member of parliament and by the Minister.70 Failing these, there may be merits review at common law and under the Constitution s 75(v), the Judiciary Act 1903 (Cth) and under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Access to the legal process would permit challenge by stakeholders such as by investors, participants and listed entities in the financial market on the basis of, for example, ‘error of law’, exceeding or failing to exercise jurisdiction, ‘jurisdictional error’ and ‘errors of law on the face of the record’.

The starting point is that stock exchange administrative decisions made under the stock exchange rules are subject to judicial review under common law administrative law principles. In the words of Black 22 years ago, never bettered:

The discretion so absolute that it has survived the appetite of the administrative lawyers and the courts for the expansion of judicial review is a rarity, to say the least.71

There are other administrative remedies open to a plaintiff – such as judicial review at


common law, under the Constitution s 75(v) and under the *Judiciary Act 1903* (Cth) s 39B – but it would not be believable that Australia’s statutory administrative law in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) would not apply to a stock exchange decision. As stated by Frug, the importance of judicial review by the courts is that it is one attempt to overcome the problems of managerial domination and personal alienation that may exist in hierarchic organisation: ‘it is because we can trust the courts that we can trust the bureaucracy’.  

The decision in the Datafin case, a common law judicial review case in the UK, premised on the absence of a statute, may illuminate the scope of review in novel regulatory arrangements for judicial review in the absence of enabling legislation. In the words of Kyrou J:  

> In my opinion, the Datafin principle represents a natural development in the evolution of the principles of judicial review. Indeed, it is a necessary development to ensure that the principles can adapt to modern government practices. The last 20 years or so have seen a growing tendency by the legislature and the executive to out-source important governmental functions to private organisations. As this trend is unlikely to abate, the Datafin principle 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.

The House of Lords in the Datafin case held that administrative panels were subject to judicial review at common law because they exercise monopolistic quasi-regulatory functions. By analogy judicial review of stock exchange decisions at common law would

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72 Judicial review in the UK is taken at common law in the absence of a statutory code such as the ADJR. Datafin, above n 10, was a common law case.

73 In the case of a Commonwealth officer, such as a staff member of ASIC - under Constitution s 75(v) (mandamus, prohibition or injunction against an officer of the Commonwealth) (not limited to ‘under an enactment’).

74 *Judiciary Act 1903* (Cth) s 39B(1A)(c) gives the Federal Court jurisdiction in any matter ‘arising under any laws made by the Parliament’ (other than criminal matters); it is not limited to ‘under an enactment’. Most migration decisions are judicially reviewable under s 39B. In the words of Sackville J in *Australian Institute of Private Detectives Ltd v Privacy Commissioner* [2004] FCA 1440, [9]. ‘It is this grant of jurisdiction that incorporates the requirement of ‘matter’ , reflecting the language of s 76(ii) and 77(i) of the Constitution’. See, eg, *Glencore International AG v Takeovers Panel* [2005] FCA 1290 (judicial review under *Judiciary Act 1903* (Cth) s 39B; no mention of the *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Glencore International AG v Takeovers Panel* [2006] FCA 274 (judicial review under *Judiciary Act 1903* (Cth) s 39B and *Administrative Decisions (Judicial Review) Act 1977* (Cth) (sections not identified), with no discussion of its scope; the court held that the Takeovers Panel had erred and an order was made against it; *CEMEX Australia Pty Ltd v Takeovers Panel* [2008] FCA 1572 (judicial review under *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16). In the words of Justice James Allsop, ‘Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002’ (2002) 23 *Australian Bar Review* 29, 33, by passing s 39B(1A), and especially s 39B(1A)(c), ‘the Commonwealth Parliament (has taken) a significant step towards transforming the court from being a court of specific federal jurisdiction into a court of more general federal jurisdiction’. In the words of Alan Robertson, ‘Where there is a basis for doubting the applicability of the AD(JR) Act, then ss 39B(1) and 39B(1A) of the *Judiciary Act* should also be relied on’: The Administrative Law Jurisdiction of the Federal Court – Is the AD(JR) Act Still Important?’ (2003) 24 *Australian Bar Review* 89, 100.

75 The ADJR is no longer Australia’s ‘primary’ administrative federal law: Allsop, Robertson, above n 74.


77 Datafin, above n 10, in *CECA Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552 [99] per Kyrou J, referring to NEAT’s case, above n 18, [67], [68] (Kirby J).
come under the principles set out in the Datafin case which permitted judicial review of private bodies which exercise public power, such as the Panel on Takeovers and Mergers (as it was then constituted). The Takeovers Panel was set up under financial services industry self-regulation with an ‘implied devolution of power’ by the government to monitor its code of rules to regulate company takeovers and mergers. The Panel effectively has the regulatory function of government. Its decisions are not required by nor made under any statutory power, yet they have the potential to affect many people including those who may not have consented to the exercise of power by the Panel. In the words of O’Shea and Rickett, even though the legal source of the authority of the Takeovers Panel is essentially contractual and private, the UK Court of Appeal has found that this power was ‘interwoven with and inextricable from executive power’. This has made the Panel a ‘hybrid’ of public and private power.

There is one potentially fatal limitation for judicial review under Constitution s 75, namely the requirement that writs can only be issued against ‘an officer of the Commonwealth’. This would catch decisions of officers of ASIC, but it would not catch officers of the stock exchanges. It does beg the question that if review under s 75(v) of the Constitution or s

 Authorities are mixed on whether Datafin has been adopted in Australia, with one judge asserting that ‘there is an absence of authority in Australia addressing the question of whether or not Datafin applies’: Chase Oyster Bar v Hamo Industries [2010] NSWCA 190, [81] (Basten JA). This article calls for a clear statement of approval by the courts.


79 NEAT’s case, above n 18, [113] (Kirby J). Other features indicating judicial review of the Takeovers Panel included the fact that some legislation assumes its existence, its Chair and Deputy chair were appointed by the Bank of England, the Panel was one of the features of the regulated financial market, its decisions have wide impact, and its decision could lead to exclusions and suspension of a listed company.

80 ‘The Panel on Takeovers and Mergers (the ‘Panel’) is an independent body, established in 1968, whose main functions are to issue and administer the City Code on Takeovers and Mergers (the ‘Code’) and to supervise and regulate takeovers and other matters to which the Code applies. Its central objective is to ensure fair treatment for all shareholders in takeover bids.

The Panel has been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers under the EC Directive on Takeover Bids (2004/25/EC) (the “Directive”). Its statutory functions are set out in and under Chapter 1 of Part 28 of the Companies Act 2006.’


82 Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia
39B of the Judiciary Act catch virtually every person making a decision under Commonwealth law, why should a stock exchange decision made under Commonwealth law be an exception?

Apart from this limitation, s 75(v) of the Constitution entrenches the High Court’s injunctive jurisdiction which may restrict the ability of federal law – such as that under the Corporations Act 2001 (Cth) – to preclude relief for non-jurisdictional errors of law.\(^{83}\) The High Court’s entrenched injunctive jurisdiction against Commonwealth officers may entail the invalidity of Commonwealth legislation which purports to authorise fraudulent exercises of statutory powers such as those under the Corporations Act.\(^{84}\) Why should the Australian financial services sector seeking judicial review of a contested decision have to bypass the Administrative Decisions (Judicial Review) Act 1977 (Cth) passed expressly for the purpose of judicial review?


Judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) of stock exchange decisions under stock exchange listing rules and operating rules would seem straightforward under the clear words in s 5 that:

a person who is aggrieved by a decision to which this Act applies … may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision of an administrative character made under an enactment.

The words are clear, but decisions of the Federal Court have added layers of interpretation to these clear words with the potential to limit their effectiveness.

The High Court has highlighted the confusion about the scope of the ADJR Act, which focuses on the source of power for a decision while s 75(v) focuses on the identity of the decision maker:

First, the term ‘decision’ was ambiguous; many decisions are made by administrators in the course of reaching an ultimate determination. The Kerr Committee had not adverted to what Mason CJ later\(^{85}\) discerned as competing policy considerations, enhancement of the administrative processes of government by providing convenient and effective means of redress, and impairment of efficient administration of government by fragmentation of its processes. Secondly, the adoption in the ADJR Act of the phrase ‘a decision of an administrative character made … under an enactment’ directed attention away from the identity of the decision-makers, the Ministers and public servants referred to by the Kerr Committee, and to the source of the power of the decision-makers. In contrast, s 75(v) of the Constitution fixes upon the phrase ‘officer of the Commonwealth’. The resultant uncertainties

\[^{83}\] See, eg, Aronson, Dyer and Groves, above n 69, 219.

\[^{84}\] See, eg Plaintiff S157/2002, above n 69, [101]-[103], 512-513 (majority), cited in Bodruddaza, above n 69, [28], 663, cited by Aronson, Dyer and Grove, above n 69, 323.


ASIC decisions under the market integrity rules are administrative, not legislative, and will be subject to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) because they fulfil the statutory prerequisites in s 5 of being made ‘under an enactment’. Written by ASIC individually for each stock exchange (licensed financial market), the market integrity rules are an ‘enactment’ which have statutory force (by means of a civil penalty) and as such are ‘instruments’ under the Legislative Instruments Act 2003 (Cth). The market integrity rules are ‘instruments’ as they are in a document which has the capacity to affect legal rights and obligations. Failing this, there is authority for a wide definition of instrument. The market integrity rules are registered on the Federal Register of Legislative Instruments.

Judicial review of stock exchange decisions is nowhere excluded by legislation, like the exemptions from merits review of ASIC decisions by the Administrative Appeals Tribunal (AAT). For example, s 1317B exempts from judicial review an ASIC decision to make a market integrity rules, or to issue, to withdraw or not to withdraw an infringement notice.


86 Griffith University v Tang, above n 31, per majority at [29].

87 The Legislative Instruments Act 2003 (Cth) provides for the publication, presentation to parliament for parliamentary scrutiny and sunsetting of Commonwealth delegated legislation. It substantially reenacted parts of the Acts Interpretation Act 1901 which dealt with regulations and disallowable instruments and extended their operation to all legislative instruments.

88 In Re Brian Lawlor Automotive Pty Limited v Collector of Customs (NSW) (1978) 1 ALD 167 (affirmed at (1979) 24 ALR 307), Brennan J considered that the instruments referred to in the Acts Interpretation Act s 33(3)) were not necessarily instruments of a legislative kind and that there was no warrant for reading down the meaning of the word ‘instrument’ because of the words which follow it in the definition of ‘enactment’ in sub-s 3(1).  

89 Australian Government Attorney-General’s Department, Legislative Instruments Compilation.

90 Corporations Act 2001 (2001) s 1317C(gca) (ASIC decision to make a market integrity rule); s 1317(gcb) (decision by the Minister to consent to, direct ASIC to revoke or amend a market integrity rule), or s 1317(gcc) (decision by ASIC to do or not do anything under regulations made for the purposes of section 798K [alternatives to civil proceedings]).

91 Corporations Act 2001 (Cth s 1317C(i), (j). ‘Decisions to issue and withdraw infringement notices are excluded from review by the Administrative Appeals Tribunal (AAT): ASIC, Markets Disciplinary Panel, above n 34, RG 000.74
Case law is mixed on whether stock exchange decisions under the stock exchange listing rules and operating rules are made ‘under an enactment’ and are therefore subject to the ADJR Act. This article recommends that this uncertainty must be resolved to bring Australian financial services regulation into line with global standards in favour of judicial review of stock exchange decisions.

The conflicting authorities on the application of the Act to stock exchange decisions and the confusion they have caused have been presented by Spigelman CJ as a ‘strong argument ... to attract judicial review’. Long overdue is the need to clarify the general principle that stock exchange decisions are made by a public body exercising a government function under the Administrative Decisions (Judicial Review) Act 1977 (Cth). Justice Kirby in Tang has pointed to the need to fix ‘the confusion into which this corner of the law has fallen’, citing five explanations presented by courts to identify a decision made ‘under an enactment’.

Public/private sector stock exchange coregulation commenced in 1970 by the state government Corporate Affairs Commissions and the stock exchanges under the predecessors to the Corporations Act 2001 (Cth). In the words of Kirby P:

> the overall scheme (of the Corporations Act), as enacted by the Parliament, appears to be one which elevates the listing requirements to a statutory importance which they did not previously have. They are now more than the private rules of a private body ... they are given statutory significance, doubtless in recognition of the fact that they necessarily affect large transactions, potentially involve the movement of very considerable funds and concern the public interest as well as the private interests of shareholders.

Henceforth stock exchange administrative decisions, made by stock exchanges as private corporations, fulfil a role imposed by statute. The example of stock exchanges could have been used by the High Court in its call in NEAT’s case for an example of a private corporation with a role in public regulation:

> ... there is an intersection between the private and the public. A private corporation is given a role in a scheme of public regulation. The parties could point to no other federal legislation in which there was a similar intersection....this presents the question whether public law remedies may be granted against private bodies.

Administrative decisions under the stock exchange listing rules and operating rules which could be challenged would include the decision to delist an entity and to suspend a participant (broker). This article argues that Australian financial services regulation would be out of line with global standards of financial services regulation if any person aggrieved or adversely affected by a decision of a stock exchange under its listing rules or operating rules were unable to seek judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth). The wrong message would be sent globally if Australian law were to appear to

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92 J J Spigelman, above n 78, 78.

93 Tang’s case, above n 31, [150].

94 Securities Industry Act 1970 (NSW) and equivalents, above n 14.

95 FAI Insurances Ltd v Pioneer Concrete Services Ltd (1986) 4 ACLC 698, 708.

96 NEAT’s case, above n 18 (majority); Datafin, above n 10, is an example at common law.
condone non-transparency and non-accountability in financial markets

The global financial services sector would be incredulous to learn that administrative review of the listing rules and operating rules in Australia could be denied by the Federal Court on the basis that they are not made ‘under an enactment’. This interpretation appears out of line with the original intention of the Administrative Decisions (Judicial Review) Act 1977 (Cth), and loses sight of the aim of the Act, an Act which was ‘based on the recommendations’ made in the reports of the Kerr Committee in 1971. The Kerr Committee said that ‘any person aggrieved or adversely affected by a decision of a Minister of the Crown, a public servant ... a statutory authority ... should be entitled in the appropriate case to seek supervisory judicial review by the Court’. It is also out of line with what was intended by the government enacting the Act. In his Second Reading Speech, the then Attorney-General Bob Ellicott QC was clear that the Administrative Decisions (Judicial Review) Act 1977 (Cth) would provide for ‘review ... of decisions of an administrative character under an Act of the Parliament, a Territory ordinance or regulations or rules made under such an Act or ordinance’. The Explanatory Memorandum explained that the Act would broaden procedures for ‘review of administrative decisions made by Commonwealth ministers and officials under statutory authority’.100

The fact that the Administrative Decisions (Judicial Review) Act 1977 (Cth) has resulted in such conflicting interpretations affecting the judicial review of listing rules and operating rules has the potential to retard the development of Australian administrative law by narrowing the administrative law values of openness, rationality, fairness, and participation. These should be protected and promoted in relation to the exercise of public power including the exercise of public power by the private sector.101

(c) Section 793C (Enforcement of Operating Rules)

The listing rules and the operating rules of the stock exchanges are contractual under Corporations Act 2001 (Cth) s 793B, but they have more than contractual significance because of their status under the Act. They are a statutory prerequisite for an Australian Market Licence (AML), granted by the Commonwealth government (the Minister). The rules are approved (‘not disallowed’) by the Minister (s 793E). The Act provides for enforcement and for third party enforcement by ASIC, the stock exchange and the rules can be enforced like legislation by outside third parties (s 793C). The rules are wider than party-party contracts. A court can give directions on the application of ASIC, a stock exchange or a


98 Commonwealth Administrative Review Committee, Report (1971) 77 (the Kerr Committee). The other report on which the ADJR Act was based was the Report of the Committee of Review of Prerogative Writ Procedures (May 1973) (the Ellicott Committee). The Report at page 113 was quoted in Tang’s case, above n 31, [28].


100 Above n 97, 3.

‘person aggrieved’ to a person who is under an obligation to comply with - or to enforce compliance with, or enforce - a listing rule such as ASX Listing Rule 3.1 (continuous disclosure). The scope of the remedies of the court is wide because its mandate is to make a decision ‘about compliance’ (s 793C(2)), so any attempt to apply a restrictive interpretation would contradict the section.\(^{102}\)

The forebear of s 793C\(^{103}\) was intended to make compliance with the listing rules statutory, as set out in the words of the second reading speech of the NSW Act by the then NSW Attorney-General Madison:

most significantly, the Supreme Court may order the observance of, enforcement of, or giving effect to, the business rules or listing rules of a stock exchange on the application of the commission or any person aggrieved by the failure to observe, enforce or give effect to those rules.\(^{104}\)

This section and its forebears has made clear since 1975 that the operating rules of a stock exchange – with third party and judicial enforcement - were no longer the rules of a private club.

(d) Decision ‘Under an Enactment’: Chapmans’ Case

This article addresses the Federal Court decision in Chapmans’ case,\(^ {105}\) upheld on appeal,\(^ {106}\) which held that a listing rule or the listing agreement between a member of ASX and ASX was not an ‘instrument’ within the meaning of the Administrative Decisions (Judicial Review) Act 1977 (Cth). It submits that the stock exchange amendments in 2010 must now lead to the conclusion that the listing rules and operating rules are ‘instruments’ for the purposes of the Act due to their statutory significance including their capacity to affect legal rights.\(^ {107}\) It supports the view that stock exchange listing rules and operating rules are within the class of rules listed as an ‘instrument’ (including rules, regulations or by-laws)’ under para (c) of the definition of ‘enactment’ made ‘under’ an Act or an Ordinance. This is in line with existing case law which includes as an ‘instrument’, for example, a handbook and circulars relating to terms of employment,\(^ {108}\) a decision to terminate employment made under the authority of


\(^{103}\) The original version was in s 31of the Securities Industry Act 1975 (Vic); Securities Industry Act 1976 (NSW); Securities Industry Act 1975 (Qld); Securities Industry Act 1976 (WA).

\(^{104}\) Hansard, Legislative Assembly, NSW, 18 November 1975, 2792. Similarly, in the upper house, Sir John Fuller, Hansard, Legislative Council, NSW, 2 December 1975, 3373 (Government); DP Landa, Legislative Council, NSW, 2 December 1975, 3386 (Opposition).

\(^{105}\) Chapmans Ltd v Australian Stock Exchange Ltd [1994] FCA 1102; (1994) 51 FCR 501 (Beaumont J), applied, eg, in Corbett v NSW [2006] NSWCA 138, [53]: ‘In the context of review of an instrument made under an act or an ordinance, it may be confined to an instrument of a legislative or administrative character (Chittick v Ackland (1984) 1 FCR 254), not extending to a contract (Chapmans Ltd v Australian Stock Exchange Ltd (1994) 51 FCR 501).’

\(^{106}\) Chapmans Ltd v Australian Stock Exchange Ltd [1996] FCA 1568 (Lockhart, Sheppard and Hill JJ).


\(^{108}\) Mair v Bartholomew (1991) 104 ALR 537; 25 ALD 487.
legislation and undertakings given by a company under the authority of the former Trade Practices Act 1974 (Cth) s 87B. Stock exchange rules affect legal rights, and are in marked contrast with documents which have been held not to be ‘instruments’ such as a handbook intended as a guide to disciplinary procedures but which did not itself affect rights and a Commonwealth scheme for compensation for damages for defective administration.

A contract may be incorporated in an Act and this may convert a decision to a decision made under the Act if that is the effect of the incorporation but this will depend on the wording and intention of the Act. Justice Beaumont decided in Chapmans’ case that the power exercised by ASX was a contractual/private power compared to a decision which is authorised or required by an enactment and given force or effect by the enactment or by a principle of law applicable to the enactment. He confirmed the judgment of the Full Federal Court in the General Newspapers Case, and held that the stock exchange listing was entered into under a contract (s 793B). The listing derived its validity from the law of contract, and that that contract was not given force and effect by the predecessor of the Corporations Act 2001 (Cth). The decision to delist was made under, and was not required or authorised by the listing rule. It was not made ‘under’ the Act, so the stock exchange decision was not a decision made under an Act and the listing rules were not an enactment.

The Administrative Decisions (Judicial Review) Act 1977 (Cth) provides for judicial review of any decision of an administrative character made under an enactment. A stock exchange decision under the operating rules and listing rules is ‘a decision to which this Act applies’ (s 5). It is not one of the stock exchange administrative decisions which are excluded under the Corporations Act 2001 (Cth). A decision for the Administrative Decisions (Judicial Review) Act 1977 (Cth) must be ‘of an administrative character’ – i.e that it applies

110. Now Australian Consumer Law s 218: see, eg, Australian Petroleum Pty Ltd v ACCC (1997) 143 ALR 381.
115. ASX, Listing Rules, art17.12 ‘ASX may at any time remove an entity from the official list if...’. Chapmans’ case, above n 104, involved a dispute about delisting under the listing rules, which at that time permitted a company to remain listed at the ‘pleasure’ of ASX. Chapmans was successful on appeal due to a technical non-compliance by stock exchange with the relevant listing rule, and the stock exchange was ordered to pay costs. Chapmans (diversified financials) was originally incorporated in 1922 and remains listed at the time of writing.
118. Administrative Decisions (Judicial Review) Act 1977 (Cth) Sch 1 sec 3 (ha) excludes decisions of the Minister under Corporations Act 2001 (Cth) Pt 7.4 Div 1 (limits on control of stock exchange)? and sec 3 (hb) decisions of the SEGC under Corporations Act Pt 7.5 (Compensation schemes for financial markets).
rules in particular cases (administrative),\(^{119}\) rather than in the content of rules of general application (legislative).\(^{120}\)

Chapmans’ case is cited as authority for the proposition that ASX is not subject to judicial review under the Act, because the stock exchange listing rules decision was not a ‘decision under an enactment’\(^{121}\). The Federal Court followed Mason CJ in Bond’s case\(^{122}\) who had held that a decision is reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) if it is ‘authorised and required’ and made ‘under’ the relevant legislation – that a ‘decision of an administrative character made ... under an enactment’ shows that the decision was one ‘which a statute requires or authorises’\(^{123}\) or ‘for which provision is made by or under a statute’.\(^{124}\)

The Act applies to decisions made under an ‘enactment’ (s 3). ‘Enactment’ is defined in s 3 to include legislation and, in para (c), ‘an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument’\(^{125}\). An ‘instrument’ does not include an administrative decision made under a contract between the parties, because a contract is not an instrument under ADJR.\(^{126}\)

The decision must be made ‘under an enactment’. There is extensive case law for the meaning of ‘under an enactment’.\(^{127}\) One view like that of Enright citing Chapmans Ltd v

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\(^{119}\) RG Capital Radio Limited v Australian Broadcasting Authority [2001] FCA 855, cited in Central Queensland Central Queensland Land Council Aboriginal Corporation v Attorney-General of the Commonwealth of Australia and State of Queensland [2002] FCA 58, [56]. The Commonwealth Minister’s decisions to make the determinations were decisions of a legislative nature, rather than administrative decisions and therefore the Administrative Decisions (Judicial Review) Act 1977 (Cth) was not available as a basis to challenge the validity of the decisions: [59]-[60].

\(^{120}\) Central Queensland Central Queensland Land Council Aboriginal Corporation, above n 145, [59].

\(^{121}\) Chapman Limited v Australian Stock Exchange Limited (1996), above n 105, [33]-[36] (Lockhart and Hill JJ); Spigelman, above n 78, 79.

\(^{122}\) Chapman Limited v Australian Stock Exchange Limited (1996), above n 106, [34].


\(^{124}\) Australian Broadcasting Tribunal v Bond [1990] HCA 33, [32], (1990) 179 CLR 321, 337.

\(^{125}\) The Explanatory Memorandum gives no assistance on the definition of ‘enactment’ other than to note that it ‘means an Act ... or an instrument made under an Act’.

\(^{126}\) Chittick v Ackland [1984] FCA 29; (1984) 1 FCR 254 (1984) 6 ALD 255, 263-264. This case involved a dispute regarding a decision under a document which set out the general terms and conditions of employment. As this document was able to be altered unilaterally by the relevant government authority, the document was an instrument within the definition of “enactment”

\(^{127}\) See, eg, CEA Technologies Pty Ltd v Civil Aviation Authority [1994] FCA 1180; 51 FCR 329 (not a decision ‘under an enactment’ because it was not a decision which a statute requires or authorises); Hutchins v DCT [1994] FCA 1200, (1994) 123 ALR 133 (the action or refusal to act must amount to an ultimate or operative determination which an enactment authorises or requires, and thereby gives it statutory effect’); Giorgas and Grant v/ Airport News Supplies v Federal Airports Corporation [1995] FCA 1290 (not a decision of an administrative character made “under an enactment” within the meaning of sec 3(1) of the Administrative Decisions (Judicial Review) Act 1977 (Cth). The respondent contends that the conduct which is challenged is
Australian Stock Exchange Ltd is that a decision is not made under an enactment when it is made under listing rules which are merely referred to in the enactment.\(^\text{126}\) The Federal Court in Chapmans’ case held that ‘the fact that the Listing Requirements are referred to in legislation does not mean that stock exchange decisions are made under the listing rules. More than identification in a statute is required before an instrument can be said to be one made under a statute.’\(^\text{129}\) Keane, supporting the narrow interpretation, does concede that “(i)t was possible, though only barely, to construe the (“made under an enactment”) limitation upon the availability of judicial review as meaning that any decision by a public authority, the existence of which could ultimately be traced to a statute, would e subject to judicial review.”\(^\text{130}\) Aronson sees the ‘under an enactment’ test as hindering the development of Australian administrative law, and that it should be replaced with a requirement that would make available to judicial review ‘decisions ... in breach of Commonwealth law imposing restraints on .. the exercise of public power’\(^\text{131}\). In contrast, the ‘under an enactment’ test has not proven to be a problem for Administrative Decisions (Judicial Review) Act 1977 (Cth) review of decisions of the Takeovers Panel, which, like the stock exchange, exercises powers ‘under an enactment’. This would be filled by the Panel exercising its powers under the Corporations Act 2001 (Cth)\(^\text{132}\). The court has a wide range of powers under s 16 of the Act including setting aside a decision and declaring the rights of the parties.

The High Court majority decision in NRAT’s case\(^\text{133}\) held that public law remedies under the Administrative Decisions (Judicial Review) Act 1977 (Cth) were not available against the Australian Wheat Board (AWB), as the role of the AWB under its Act was of a private character made under the Corporations Act 2001 (Cth)\(^\text{134}\). The High Court held that the AWB was under no obligation to pursue public considerations when making a decision and that it was not possible to both impose public law obligations on AWB and allow it to pursue its private interests. In Aronson’s view, this ‘all or nothing’ approach of the High Court in NEAT to judicial review was ‘regrettable’,\(^\text{135}\) and instead, the court should have addressed

conduct of a commercial nature occurring in a commercial context leading to the making of contracts.

\(^{126}\) Christopher Enright, Federal Administrative Law (2001) [22.165], citing Chapmans’ case, above n 104.


\(^{130}\) Keane, above n 117, 624.


\(^{133}\) NEAT’s case, above n 18 (Gleeson CJ, McHugh, Hayne, Callinan JJ; Kirby J in dissent).

\(^{134}\) AWB was a company incorporated under corporations legislation, engaged in trade and commerce.

\(^{135}\) Aronson, Dyer and Groves, above n 69, 149.
whether the AWB was exercising public or private power.  

Mantziaris and McDonald also argue that the courts should face the intermingling of the public and private divide in the context of self-regulation and coregulation: ‘The judicial retreat into the statutory language of “under an enactment” or the constitutional “matter”concept avoids engagement with these issues. It serves to mask rather than justify the normative judgments underpinning legal outcomes.’ 

However, the dicta of Gleeson CJ and the dissent of Kirby J do point to potential development of the Administrative Decisions (Judicial Review) Act 1977 (Cth) into the future. There was a suggestion in the judgment of Gleeson CJ (in the majority) that tended towards the view that the AWB issuing a permit to export wheat was made under an enactment. This would have made the decision of the AWB a decision of an administrative character made under an enactment and therefore reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth):

> The argument that what is involved is not a decision of an administrative character under an enactment takes as its focus the private interests represented, and pursued, by AWBI, as distinct from the public character of the Wheat Export Authority. That appears to me to involve an incomplete view of the interests represented by AWBI, and also to leave out of account the character of what it does, which is, in substance, the exercise of a statutory power to deprive the Wheat Export Authority of the capacity to consent to the bulk export of wheat in a given case.

The dissent of Kirby J held that the AWB decision was a decision of an administrative character which was subject to the Act.

Allars, for example, has noted and supported the hint of a broader conception of public power in the private sector by Beaumont J in Chapmans Ltd v Australian Stock Exchange Ltd when he noted that consistency of principle would suggest that procedural fairness could be extended to some areas of the private sector hitherto not subject to administrative law review:

> It is also true that the legislative scheme establishes a regime which permits a degree of regulation by public authorities in the public interest. It may be possible to argue from this that, for instance, there are imposed upon the respondent duties of a public character which may be susceptible of judicial review under the Court's supervisory jurisdiction in the form of a prerogative writ issued under s 39B of the


137 NEAT’s case, above n 18, [67].

138 NEAT’s case, above n 18, [29].

139 Allars, above n 101, 75.
The tentative steps for the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in the AWB case were followed in the High Court by Tang’s case, a case which involved a challenge to the procedural fairness of a university decision to terminate a student’s PhD candidature. Tang argued that the university decision was not made by the university under any contract with the university, and that it was therefore made under a statute which would be reviewable under the Act. This was rejected by the High Court’s decision that the university’s decision was not made ‘under an enactment’ because the decision was not provided for in the university legislation and it did not affect legal rights and obligations, and it therefore did not give rise to judicial review under the Act. The High Court held that as the university’s decision to terminate the candidature was not authorised or given effect to by statute, it was not made under an enactment. To a financial services commentator, this reads as a specious reasoning deceiving only the global financial services markets about Australia’s transparency and accountability in financial services regulation. Indeed, this reasoning did not convince five of the nine judges who heard the case who did support the application of the Act to the decision of the university.

Is there a decision under a scheme established under Commonwealth executive power or under legislation? To be reviewable, a stock exchange decision must have been authorised or required by an enactment, are given force or effect by the enactment - the approach in *General Newspapers* was that the decision derived its effect from the relevant legislation. This approach was adopted by the High Court majority in *Griffith University v Tang*:

… a statutory grant of a bare capacity to contract does not suffice to endow subsequent contracts with the character of having been made under that enactment. A legislative grant of capacity to contract to a statutory body will not, without more, be sufficient to empower that body unilaterally to affect the rights or liabilities of any other party. The power to affect the other party’s rights and obligations will be derived not from the enactment but from such agreement as has been made between the parties. A decision to enter into a contract would have no legal effect without the consent of the other party; the agreement between the parties is the origin of the rights and liabilities as between the parties.

The decision of Kirby J in dismissing the university’s appeal ‘avoids glossing the phrase “under an enactment” with an additional vague and opaque requirement that is not in the Act and that contradicts the standing and interest provisions that are there.’

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141 *Chapmans case*, above n 105, [29].

142 *Griffith University Act 1998* (Qld).

143 Three Supreme Court judges rejected the university’s application for dismissal of claim: *Tang v Griffith University* [2003] QSC 22 (Mackenzie J); *Tang v Griffith University* [2003] QCA 571 (Jerrard JA for the university, Dutney and Philippides JJ).

144 *General Newspapers Pty Ltd*, above n 114, ALR 636.


146 Tang’s case, above n 31, [164].
The ‘under an enactment’ test remains work in progress. For example, Spigelman CJ has raised this for consideration as a ‘strong argument .. for judicial review’. This is a vexed area with many differing judgments and strong views. At least five different explanations have been presented by the courts to identify when a decision is made ‘under an enactment’ – (1) the core functions test, (2) the proximate source test, (3) the ‘authorised or required test’, (4) the ‘rights and duties’ test and (5) the need for statutory authority test. This area of confusion in the Administrative Decisions (Judicial Review) Act 1977 (Cth) needs to be taken back to the clear language and interpretation of the then Attorney-General and the draftsman of the Act Bob Ellicott QC, when as Ellicott J in Burns’ case in 1982 setting out what is the ‘core functions test’:

But it would be wrong, in my view, to exclude from the operation of the Act fundamental decisions of the University (a body created by statute) through its Council about matters lying at the very heart of its existence and essential to the fulfilment of the basic function for which the University was set up by Parliament.

This article argues that stock exchange decisions under the listing rules and operating rules are reviewable by the courts under the Administrative Decisions (Judicial Review) Act 1977 (Cth) because they are made under a contract which is ‘under an enactment’ (the Corporations Act 2001 (Cth)). The power of stock exchange to draft operating rules and listing rules is a power delegated to it by the Corporations Act 2001 (Cth), and these rules are drafted by the stock exchange exercising a quasi-government role.

The Administrative Decisions (Judicial Review) Act 1977 (Cth) was enacted to streamline the administrative law prerogative writs which Attorney-General Ellicott had described as an area of law in need of reform due to their then ‘medieval’ status. The Explanatory Memorandum said that the Act procedures and remedies will be ‘simpler’ than under the prerogative writs at common law. This article has recommended that if there is no new judicial law-making to ensure that the Administrative Decisions (Judicial Review) Act 1977 (Cth) will permit judicial review of stock exchange listing rules and operating rules, the Act will continue to hold back the development of administrative accountability in Australia. It is time to clarify the ‘under an enactment’ test with some judicial lawmaking:

‘The approach taken in a given case must be consistent with what Brennan J described as the “skeleton of principle” and (at least so far as lower and intermediate courts are concerned) conformable with precedent. Most importantly, they must justify their conclusions by a process of inductive reasoning

147 J J Spigelman, above n 78, 78.

148 Strict interpretation of ‘under an enactment’: P A Keane, above n 116; other interpretations cited by Keane, above n 116 at ALJ 625, n 9.

149 Tang, above n 31, [150] (Kirby J).


151 House of Representatives Parliamentary Debates (Hansard), above n 99, 1394.

152 Explanatory Memorandum, above n 97, 3.
that can be subjected to close and critical scrutiny.\textsuperscript{153}

This article supports the triple citation - spanning a century - of Spigelman CJ in 2010,\textsuperscript{154} where the Chief Justice cited Dixon J’s citation of Lord Alverstone CJ in 1905 that ‘the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language’.\textsuperscript{155} The purpose of the stock exchange listing rules and operating rules is to promote a market which is fair, orderly and transparent under enforceable laws.

4. Judicial Review - Public/private Divide

There is authority that administrative decisions of non-governmental bodies – such as a stock exchange - will be reviewable when they operate as part of a regulatory system which, although non-statutory, indicates government concern and is supported by statutory powers and penalties. This is sometimes described as crossing the private/public divide.\textsuperscript{156} This includes decisions of non-governmental bodies which may have consequences for the public where there is not only a public but potentially a governmental interest in the decision-making power in question.\textsuperscript{157} Spigelman CJ has kept this issue on the agenda by raising it for consideration with his comment ex curia that ‘The extension of public law to private organisations is unresolved in the authorities.’\textsuperscript{158} This article recommends resolution in favour of judicial review. For example, Lord Hoffman in the Jockey Club case\textsuperscript{159} could see no reason why a private club should not also exercise public powers. He gave the example of The Law Society, which he described as essentially a club, incorporated by royal charter, which exercises public powers, conferred by statute in the public interest. It therefore operates in the realm of public law.\textsuperscript{160} To apply Lord Hoffman’s terminology, the stock


\textsuperscript{155} Dixon J in H Jones & Co Pty Ltd v Kingborough Corporation [1950] HCA 11, [56]; (1950) 82 CLR 282, 318, citing R v Vasey [1905] 2 KB 748, 751.

\textsuperscript{156} See, eg, Margaret Allars, above n 101, 73; Campbell, above n 131, 34.

\textsuperscript{157} Regina v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann [1992] 1 WLR 1036, which cites Burgers v Du Plessis (1866) 1 Roscoe 385 where the disciplinary action of an ecclesiastical body was looked at by the court.

\textsuperscript{158} Spigelman, above n 78, 75.

\textsuperscript{159} R v Jockey Club, Ex parte Aga Khan, above n 16.

\textsuperscript{160} Swain v Law Society [1982] 2 All ER 827, [1983] 1 AC 598. Compare, eg, D’Souza v Royal Australian and New Zealand College of Psychiatrists (2005) 12 VR 42 (a decision of the review panel of the college to elect a candidate to fellowship was not subject to judicial review. The college did not exercise public functions and powers, even though election did have legal and public consequences. The panel’s decision was based on a contractual relationship between the parties). This case was cited in Masu, below n 105, to indicate the type of considerations which might lead to a conclusion that a body was exercising powers of a public nature.
exchange is ‘a private body established by the industry but integrated into a system of statutory regulation’.161 Other examples of private bodies integrated into statutory regulation include, in the words of Spigelman CJ:

The Chief Justice’s inclusion of ASX is as important example of an authority which exercises power. Any stock exchange operating a financial market would fill the model of ‘privatisation of the business of government itself’ as a private body established by the industry but integrated into a system of statutory regulation.163 In contrast, the courts have been less prepared to exercise judicial powers over the public powers exercised by religious bodies164 and sports governing bodies165 despite their influence over big sectors of the community.

Stock exchanges operate in the public interest, with an immeasurable influence in the community. As operators of financial markets licensed by the Minister (the Commonwealth government) through ASIC under the Corporations Act 2001 (Cth), they operate like a delegate of government. Their legal and statutory structure should overcome any uncertainties that their administrative decisions are only contractual and only enforceable by the parties to that contract. They are public, not private, and are of a governmental nature and as such, they have sufficient public character to attract judicial review.

Judicial review should include judicial review of stock exchange decisions under both

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161 R v Jockey Club; Ex parte Aga Khan, above n 16, 931-932.


Add, eg, in the UK, the Advertising Standards Authority; the Press Complaints Commission: see, eg Wade and Forsyth, above n 78, 540ff.


164 See, eg R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, above n 157.

165 R v Jockey Club, above n 16.
legislation and soft law. For example, the Administrative Review Council has recommended continuing monitoring of the accountability mechanisms of government or non-government agencies that apply to action taken on the basis of soft law business rules:

The Council does not consider it would necessarily be effective or efficient to seek to extend administrative law review mechanisms to these areas of co- and self-regulation. It would, however, be reasonable to assume that such soft law rules should give rise to an appropriate form of accountability. This was also the prevailing view put forward during the Council’s consultations.

This would include the soft law of a non-government body like the Financial Ombudsman Service Ltd (FOS), a body which has ASIC approval as an external dispute resolution scheme (EDR). ASIC approval gives rise to an element of government delegation to FOS, as it is ASIC which sets the standard on how an EDR can become ASIC approved and how it must operate to retain its ASIC approval. The legal status of FOS is therefore a mixture of ASIC authority and contract with its members, and this has led to conflicting decisions on whether the predecessor to FOS would be subject to judicial review. McGill, for example, argues that judicial review should not be available either at common law or under legislation to review FOS decisions because its jurisdiction is derived from a contract made with its members.

However, the court in Masu (No 2) held that decisions of the predecessor of FOS (the former Financial Industry Complaints Scheme: FICS) administering external complaints schemes regarding participants in the financial services industry are judicially reviewable on

166 Soft law is explained above n 8.


168 FOS is an independent corporation set up by the financial industry to resolve disputes between consumers and financial services providers which operates in the framework of the Corporations Act 2001 (Cth).

169 See, e.g., Corporations Regulations 2001 (Cth) reg 7.6.02(4), 7.9.77(4); ASIC, Approval and Oversight of External Dispute Resolution Schemes (Regulatory Guide 139, 2010).

170 The Financial Industry Complaints Service Ltd (FICS), which merged into FOS in 2008. FOS is the result of the merger of the former industry bodies, and has developed from the former Financial Institutions Complaints Scheme, which was set up by its members to provide alternative dispute resolution services for complaints brought by consumers against financial services industry members. FOS disputes have a maximum jurisdiction to $500,000.


173 Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd and Julie Wong (No 2) [2004] NSWSC 824; 23 ACLC 215. [7]. Compare Masu Financial Management P/L v Financial Industry Complaints Service Ltd and Julie Wong (No 1) [2004] NSWSC 826 (held that FICS did not exercise judicial power and that its decisions were of an administrative or arbitral not judicial nature).
administrative law grounds, including the ground of breach of procedural fairness, in part due to the entity’s government flavour and its resembling a privatisation of the business of government with a public character. The tests in Masu (No 2) regarding FICS would suggest that FOS may be subject to judicial review. The Corporations Act 2001 (Cth) requires the holder of an Australian Financial Services Licence (AFSL, such as a broker) to have a dispute resolution scheme with both internal and external dispute resolution aspects (s 912A(1)(g)). FOS is constituted as an external dispute resolution scheme in compliance with the regulatory guide issued by ASIC (as a Commonwealth government agency).174 FOS was established under the umbrella of a regulation made by the Australian executive government under the Corporations Act 2001 (Cth).175 Failure to comply with a decision of FOS could result in the Commonwealth government (through ASIC) cancelling an AFSL and exposing the licensee (broker) to prosecution if it continued to operate without a licence.

Wade and Forsyth say it will take a ‘quantum leap’ for courts to review a body existing in private law which is in no sense governmental and to bring them within the law for controlling government bodies, yet then then proceed to give many examples of just this from the sporting world in Canada, England, NZ and Scotland.176 Time to clarify the application of Datafin principles......

5 Judicial Review - Comparative standards

The standards of financial regulation to aim for are those agreed to by the International Organization of Securities Commissions (IOSCO),177 an organisation which represents commissions and some entities of most countries with developed financial markets. IOSCO was set up to enhance protection for investors to ensure that markets are fair, efficient and transparent and to reduce systemic risk. Membership of IOSCO indicates adherence to and support of the IOSCO objectives and principles including those of disclosure and accountability. For example, one of the IOSCO objectives and principles is that ‘(t)he regulator should be operationally independent and accountable in the exercise of its functions and powers’,178 and that use should be made of self-regulatory organisations179 which should be subject to the oversight of the regulator. These IOSCO standards should be in the minds of Australian courts when interpreting Australian administrative law.

Further comparative standards for Australian courts to assist in interpreting administrative law in the area of financial services regulation can be found in the standards of the European


175 FOS is an independent agency with no connection to government and is no government role in FOS. The Commonwealth government was originally involved in FICS appointments, but this is not the case with FOS.

176 Wade and Forsyth, above n 78, 546 (referring to sporting bodies).

177 IOSCO has 114 ordinary members, 11 associate members and 12 affiliate members (at I January 2011). ASIC is an ordinary member.


179 SROs, which include stock exchanges.
Convention on Human Rights, a convention which guarantees a range of political rights and freedoms of the individual against interference by the State. Public authorities in the European Union (EU) are subject to, for example, article 6 which provides that in the case of determining civil rights, a person has the right to a fair and public hearing by an independent and impartial tribunal within reasonable time including the right to examine witnesses against them. As Wade and Forsyth indicate, the European Convention does not refer specifically to administrative proceedings, but it does apply to administrative proceedings which are considered to be ‘decisive’ of civil rights so it will be potentially relevant in many cases. In the UK, for example, the Human Rights Act 1998 (UK) incorporates into UK domestic law the rights and liberties set out in the European convention such as access to judicial review against a public authority (ss 7, 8). It prohibits a public authority from acting in a way which is incompatible with a convention right (s 6). These set clear expectations that public authorities will provide a fair and public hearing in the exercise of their powers.

The global standard for judicial review of Australian stock exchange decisions can be illustrated with many comparative examples, and there is the risk that Australian financial

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180 Section 6(3) defines a ‘public authority’ to include ‘(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature’. It provides in s 6(5) that a person is not a public authority ...if the nature of the act is private.’ The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as the privatised utilities’; Secretary of State for the Home Department, Rights Brought Home: The Human Rights Bill (October 1997), CM 3782, para 2.2.


182 Wade and Forsyth, above n 78, 375-378.

183 For example:

(1) China provides for judicial review of decisions of the Shanghai Stock Exchange and the Shenzhen Stock Exchange such as a decision to suspend trading in the shares of a listed company. Article 62 of the Securities Law 2006 (PRC) provides for internal review:

An application for a review may be submitted to the review organization established by the stock exchange in the event of dissatisfaction with a decision by the stock exchange to suspend or terminate a listing, or not to grant a listing.

The Securities Law 2006 (PRC) provides for appeal to a people’s court from ‘a punishment decision of the securities regulatory authority or the department(s) authorised by the State council’ (art 235).

Also Administrative Litigation Law, PRC (4 April 1989):

Art 2 Where citizens and legal persons or other organizations which consider that specific acts of administrative authorities or their personnel have infringed their lawful interests, they shall have the right to institute proceedings in the People’s Court.

(2) India provides for judicial review of decisions of the stock exchanges of India (see, eg, National Stock
services regulation may fall behind global standards if judicial review fails to minimise the potential for abuse of power by financial market authorities such as ASIC and the stock exchanges. Judicial review of ASIC and stock exchange administrative decisions at common law does seem assured, but judicial review of stock exchange decisions in Australia under the Administrative Decisions (Judicial Review) Act 1977 (Cth) has resulted in gaps which leave Australian financial services regulation below comparative standards. These should be overruled to bring Australia into line with comparative best practice.184

IV SUMMARY AND CONCLUSION

Long gone are the days when stock exchanges self-regulated as a private club. Stock exchange regulation under statute now includes the new ASIC market integrity rules made by ASIC under the authority of Corporations Act 2001 (Cth), acting as a delegate of the Commonwealth government. Breach of a market integrity rule may lead to civil penalty enforceable in the courts. As a legislatice ‘instrument .. rule, regulation or by-law’ made under a statute, the market integrity rules are an ‘enactment’. As such, stock exchange administrative decisions are subject to judicial review under the Administrative Decisions Exchange, Bombay Stock Exchange, Calcutta Stock Exchange). The Indian Constitution has created an independent judiciary which is vested with the power of judicial review to determine the legality of administrative action and the validity of legislation: Indian Constitution (1950) article 32 (Power of the Supreme Court to issue prerogative writs judicial review); article 226 (Power of the High court to issue prerogative writs to any person or authority).

For example, in L. Chandra Kumar v Union of India AIR 1997 SC 1125, [78], the Supreme Court of India stated ‘that the power of judicial review over legislative action vested in the High Court under article 226 and in this court (the Supreme Court) under article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure’.

The High Court of Delhi in National Stock Exchange of India Ltd v Central Information Commission (at Delhi, 15 April 2010) cited Binny Ltd v V V Sadasivan (2005) 6 SCC 657, where the Supreme Court of India had reiterated that article 226 of the Constitution is couched in a way that even a writ can be issued against a body which is discharging public function and the decision sought to be corrected or enforced must be in discharge of a public function. A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies, therefore, exercise public functions when they intervene or participate in social or economic affairs of public interest.

Judicial review of decisions of the Securities and Exchange Board of India can go to the Securities Appellate Tribunal, with the possibility of a second appeal to the Supreme Court of India.

(3) UK. Datafin is cited above at n 10.


In addition to ASIC regulation under the market integrity rules, stock exchanges operate under their self-written but government approved listing rules and operating rules. Stock exchange listing rules and operating rules are subject to judicial review at common law under the principles in the Datafin and similar cases. In addition, judicial review of the operating rules would be available under *Judiciary Act 1903* (Cth) s 39B. This would fill the potential gap left by the current view that the operating rules as ‘rules’ do not fall within the definition of an ‘enactment’ and are therefore not subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), confirmed by their statutory basis in the *Corporations Act 2001* (Cth). The third difficulty with judicial review of operating rules is that constitution s 75(v) would appear not to apply to stock exchange decisions as they are not made by ‘an officer of the Commonwealth’.

‘Adequate’ operating rules are a prerequisite for approval by the Commonwealth government (the Minister) as a licensed financial market (s 795B(1)(c)), as discussed above. The listing rules and operating rules are required to provide for protection of the interests of the public – for example, that the market is ‘fair, orderly and transparent’ (*Corporations Act 2001* (Cth) ss 792A(a), 795B(1)(c)), that there are adequate operating rules, that there is sufficient in the fidelity fund (s 795B(1)(f)). The listing rules are required to make provision for admitting entities to the market and their activities and conduct (s 761A Definitions ‘listing rules’ para (b)). The listing rules and operating rules are written by the stock exchange, approved by the Minister (the Commonwealth government), and can only be altered with permission of the Minister (the Commonwealth government) when they are not disallowed. They have the capacity to affect the legal rights and obligations of a person.

The listing rules and operating rules are the foundation for cooperation arrangements (but not coregulation) between ASIC and the stock exchange. Stock exchange decisions are made ‘under’ the listing rules and operating rules. The listing rules and operating rules create obligations which are additional to, and complement, common law and statutory obligations. Like legislation, regulations and by-laws, they are subject to third party enforcement against listed entities and brokers as they can be enforced by third parties like ASIC, a stock exchange or a ‘person aggrieved’ such as a shareholder, investor, takeover bidder or member of a class action. On the application of one of these parties, the court can make an order against a person with an obligation or a deemed obligation to comply with the operating rules. Requirements under listing rules and operating rules have further third party enforced under *Corporations Act 2001* (Cth) s 1101B on the application of ASIC, a stock exchange and an undefined ‘person aggrieved’.

Stock exchange decisions involve the exercise of public power through a private entity (stock exchanges are companies, not government). In addition to judicial review at common law, case law awaits a clear recognition that stock exchange administrative decisions are subject to judicial review to ensure the application of administrative law values like accountability, fairness, openness and procedural fairness. Stock exchange decisions have statutory

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186 Above n 10.
significance to promote investor confidence to enable stock exchanges to continue to attract investment for economic growth in the national interest.