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Abstract
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Keywords
Chapmans Ltd v Australian Stock Exchange Ltd, Administrative Decisions (Judicial Review) Act, stock exchange rules, Corporations Law

NOTES

LEGAL ENFORCEMENT OF STOCK EXCHANGE RULES: PART II*

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Introduction

This note is written to update the author's article 'The legal enforcement of stock exchange rules' published in (1995) 7 Bond Law Review 1-17. This article analysed the operation and effect of stock exchange listing rules now that they have statutory significance under many sections of the *Corporations Law* including ss 777 and 1114. It was critical of the decisions of Beaumont J at first instance in *Chapmans Ltd v Australian Stock Exchange Ltd* (1994 and 1995), which had held *inter alia* that decisions made by the Australian Stock Exchange under the stock exchange listing rules are not subject to review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). This decision has now been upheld on appeal by the Full Federal Court in *Chapmans Ltd v Australian Stock Exchange Ltd* (1996).

Chapmans' case on appeal

The decision in the appeal in *Chapmans'* case again highlights the important question of whether a decision of the Australian Stock Exchange (hereafter "ASX") under the ASX listing rules is subject to review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (hereafter "ADJR Act"). ASX decisions are clearly subject to review at common law,[1] but the effect of the decision in *Chapmans'* case is to deny listed companies and others administrative remedies against the ASX under the ADJR Act.

In the facts giving rise to the case, the ASX removed the securities of Chapmans Ltd (hereafter Chapmans), a listed company, from the Official List

* Part I was published at (1995) 2 Bond LR 7.

1 Eg. Black, A, 'Judicial review of discretionary decisions of Australian Stock Exchange Limited' (1989) 5 Aust Bar Review 91; Gillooly, M, 'Public Law Review of ASX Delisting Decisions' (1995) 13 Aust Bar Review 221.

in December 1993 (ie suspended trading) pending clarification of certain matters arising from the company's Annual Report.[2]

Chapmans was unsuccessful in its application for judicial review under the ADJR Act, arguing that the ASX's decision to delist under the listing rules was a decision made under an "enactment". At first instance in *Chapmans'* case,[3] upheld on appeal,[4] Beaumont J held that because the listing rules and any listing agreement "derive their force and effect from the law of contract", not from legislation,[5] decisions under them were not reviewable under the ADJR Act. This view was upheld on appeal by the Full Federal Court.

These decisions in *Chapmans'* case contradict the express purpose of the ADJR Act which targets 'decisions of an administrative character under an Act of the Parliament', and it goes against the reforming purpose of the ADJR Act as expressed in the background reports and in the Minister's second reading speech.

The ADJR Act

The *Administrative Decisions (Judicial Review) Act* 1977 (Cth) was passed to reform the pre-existing law to provide for judicial review of Commonwealth administrative actions 'as an alternative to the present cumbersome and technical procedures for review by way of prerogative writ, or the present actions for a declaration or injunction'.[6] The pre-existing law was described by the Attorney-General as being in a most unsatisfactory state. In particular, the ADJR Act was designed to provide 'for review by the Federal Court of Australia of decisions of an administrative character under an Act of the Parliament ... or regulations or rules made under such Act'.[7]

In the words of the Explanatory Memorandum, the ADJR Act was 'based on the recommendations'[8] made in the reports of the Kerr Committee in 1971 that 'any person aggrieved or adversely affected by a decision of a Minister of the Crown, a public servant ... a statutory authority ... should be

2 Trading in Chapmans' shares was suspended by the ASX for Chapmans' failure to keep the market fully informed and for breach of listing rules 3J(13) and (14) (failure to maintain the required level of net tangible assets).

3 *Chapmans Ltd v Australian Stock Exchange Ltd* (1994) 12 ACLC 512.

4 *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 14 ACLC 1297 (Full Federal Court).

5 I.e. the Corporations Law.

6 Mr R Ellicott, Attorney-General, Second Reading Speech, Hansard, House of Representatives, 28 April 1977, p 1394.

7 Ibid at 1395.

8 House of Representatives, Administrative Decisions (Judicial Review) Bill 1977, Explanaotry Memorandum, 1.

entitled in the appropriate case to seek supervisory judicial review by the Court'.[9]

The ADJR Act provides for judicial review of 'a decision to which this Act applies' (s 5) and of 'conduct (engaged in) for the purpose of making a decision to which this Act applies' (s 6). The Act defines a 'decision to which this Act applies' as a 'decision of an administrative character made ... under an enactment' (s 3(1)). The Act does not define 'decision', but it defines 'enactment' to mean (*inter alia*) 'Act ... or ... an instrument (including rules, regulations or by-laws) made under such an Act'. 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'.[10]

At issue in *Chapmans'* case was whether the decision to delist was made 'under an enactment' within s 3(1). There is extensive case law on this expression,[11] and in view of their special status, any purposive interpretation should accept that an ASX decision made under the ASX listing rules is made 'under an enactment' for the purposes of the ADJR Act.

Upholding the narrow interpretation of 'under an enactment', Beaumont J at first instance held that the delisting decision under the ASX listing rules did not come within the test of the Full Federal Court in the *Telstra* case which stated that the ADJR Act was 'concerned with decisions which, being authorised or required by an enactment, are given force or effect by the enactment or by a principle of law applicable to the enactment'.[12] Conveniently for his interpretation, his Honour did not cite the next sentence that '[i]ssues concerning the relevant factors to be taken into account ... will be matters to be decided having regard to the provisions of the enactment under which the decision is made, and the object and purposes of that enactment'.[13] It is submitted that the special statutory status of the listing rules is one such relevant factor to determine that.

The decision in *Chapmans'* case held that the listing contract entered into under a general power to contract was not given force and effect by the Corporations Law but that it derived its validity from law of contract. In the view of the Full Court, the word 'under' in 'under an enactment' means to be required by or authorised by or in pursuance of the relevant statute.

It is submitted that *Chapmans'* case is a result of selective citation of authority which overlooks the authority and purpose of the listing rules.

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9 Commonwealth Administrative Review Committee, Report, AGPS (August 1971), p 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, AGPS (May 1973) (the Ellicott Committee).

10 See above n 8 at 4.

11 See eg. Australian Legal Words and Phrases, 1990-1996, Butterworths, Vol 3, 1996 at 526 ('under an enactment').

12 In Chapmans' case, see above n 3 at 519, citing *General Newspapers Pty Ltd v Telstra Corporation* (1993) ATPR P41-274 at 41,686. The Telstra case was not cited on appeal.

13 Ibid.

Chapmans' case, and the decision in the *Telstra* case, correctly applied the decision in *Australian National University v Burns*,[14] which held that termination of employment between the university and a professor was not reviewable under the ADJR Act, as the rights and duties of the parties were a matter arising under contract, not the relevant legislation. But *Chapmans'* case overlooks the *ACT Health Authority* case,[15] which held that a decision of a statutory body established under Commonwealth law not to award a contract was made 'under an enactment'. Similarly, a decision to reject a tender made by a corporation set up under Commonwealth law was held in the *Federal Airports'* case to be made 'under an enactment'.[16] It is submitted that these judgments are indistinguishable from a decision made by the ASX under the listing rules.

Chapmans' case recognised the need for proximity between the decision to delist and the enactment so that the decision can be characterised as one made under the enactment,[17] and correctly applied authority which held that for a decision to be 'under an enactment', it must be characterised as having been made under a statute.[18]

In view of their special statutory status, the ASX listing rules have more than contractual significance.

Statutory significance of the Australian Stock Exchange listing rules

The decision in *Chapmans'* case overlooks the statutory significance of the ASX listing rules. It must be remembered that in the often-quoted words of Kirby J, 'the overall scheme [of the *Corporations Law*], 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'.[19] This policy formulation of Kirby J correctly recognises the importance in the national interest of the credibility of the market to attract investment for economic growth.

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14 (1982) 43 ALR 25.

15 *Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd* (1985) 60 ALR 284 (Full Federal Court).

16 *James Richardson Corporation Pty Ltd v Federal Airports Corporation* (1992) 117 ALR 277.

17 *Chapmans*' case, above n 4, at 1,303-1,304.

18 *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 51 FCR 329 at 333; *Lewins v Australian National University* (1995) 133 ALR 452 at 460.

19 *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1986) ASLR p76-110 at 85,137.

In the words of the ASX, '[t]he listing rules are not just binding contractually. They are enforceable against listed entities and their associates under the Corporations Law ... The listing rules create obligations that are additional, and complementary, to common law and statutory ones'.[20]

Until 1970-71, the stock exchanges were privately incorporated bodies and their rules were privately drafted by the boards of the then six Australian stock exchanges under their memorandum and articles of association with no outside scrutiny. This changed when the 1970-71 securities industry legislation[21] introduced a limited statutory regime with the forbears of for example ss 767, 769, 774 and 777. As from this time, listing rule amendments made by the stock exchanges were to be notified to the relevant government regulator (currently the Australian Securities Commission (hereafter 'ASC')) and the Minister (currently the Commonwealth Treasurer), with the Minister having the right of disallowance (s 774(5)). The rules are no longer made privately, and are subject to both ASC approval (if not disallowed) and government approval by the Minister.

The very existence of the ASX is based on incorporation under Commonwealth legislation, the *Securities Industry Act* 1987 (Cth) in 1987. This statutory incorporation replaced the previous six privately incorporated stock exchanges which went back to the nineteenth century.

The pre-existence of the listing rules of the former stock exchanges - made privately by the exchanges (s 36E) - were recognised by s 36E(4) of the 1987 Act (saved by s 81 of the *Corporations Act* 1989 (Cth)), which stated that `the proposed listing rules ... of the Exchange that AASE lodged with the Commission[22] before the commencement shall be deemed ... to be rules made by the Exchange at that commencement under its articles'.

It is correct to say, as did the Full Court in *Chapmans*' case, that 'more than identification in a statute is required before an instrument can be said to be one made under a Statute'.[23] It is incorrect to apply this analysis to the Australian system of stock exchange statutory and contractual co-regulation due to the statutory basis of the listing rules.

It is submitted that the listing rules are at least the equivalent of an instrument (including rules, regulations or by-laws) made under statute.

There is authority to support the proposition that the listing rules clearly satisfy the test of an 'instrument' (including rules, regulations or by-

20 Australian Stock Exchange Ltd, *Listing Rules Simplification*, 5 (April 1995).

21 *Securities Industry Act* 1970 (Vic); 1970 (WA); 1970 (Qld).

22 I.e. the then National Companies and Securities Commission, the forbear of the Australian Securities Commission.

23 *Chapmans*' case, above n 4, 1,304.

laws) made under statute so as to be an 'enactment' under s 3(1) of the ADJR Act:[24] 'that to qualify as an instrument for the purposes of the Judicial Review Act the document must be of such a kind that it has the capacity to affect legal rights and obligations'.

At first instance, Beaumont J recognised that the legislative scheme regulating the ASX does establish a regime which permits a degree of regulation by public authorities in the public interest.[25] He recognised that these duties are of a public character and that they may be subject to judicial review in a prerogative writ under *Judiciary Act* 1903 (Cth) s 39B. He recognised there are policy reasons why there should be public duties justiciable in this area.[26]

It is true that the listing rules gain their effect from the listing contract, but their authority to bind is contractual and statutory. The listing rules impose contractual requirements, and they also impose important statutory obligations outside the contract. The listing rules have direct statutory significance as follows:

1 The listing rules are recognised in the legislation incorporating the ASX.[27]

2 The listing rules are recognised in, and defined in, *Corporations Law* s 761.

3 The listing rules are required for approval as a stock exchange in *Corporations Law* s 769(2)(c). Approval requires application to the ASC for approval by the Minister.

4 The listing rules are required to make provision for trading [*Corporations Law* ss 769(2)(d)(i)].

5 The listing rules are required to provide for the protection of the interests of the public [*Corporations Law* s 769(2)(d)(i)].

6 The listing rules are required to have sufficient in the fidelity fund for the purposes of Part 7.9 [ss 769(2)(e)].

7 The listing rules have the capacity to affect the legal rights and obligations of a person. In the words of the ASX, the listing rules 'govern the admission of entities to the official list, quotation of securities, suspension of securities from quotation and removal of

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24 *Chittick v Ackland* (1984) 1 FCR 254 at 264, cited in Chapmans' case, above n 4 at 1,304; Brewster, D, 'Decisions under the Australian Stock Exchange Listing Rules: Review under the *Administrative Decisions (Judicial Review) Act*' (1991) 9 C & SLJ 377 at 387.

25 Chapmans' case, above n 3, at 519. Public authorities include the ASC, Commonwealth Treasury, the Australian Competition and Consumer Commission and the National Crime Authority.

26 Citing Black, above n 1.

27 *Securities Industry Act* 1980 (Cth) s 36E.

entities from the official list. They also govern disclosure[28] and some aspects of a listed entity's conduct. Compliance with the listing rules is a requirement for admission to the official list. It is also a requirement under the contract that an entity enters into on being admitted'.[29]

8 The listing rules can be altered unilaterally by the ASX, but this is subject to the power of the ASC/Minister to disallow the amendments [s 774(5)].

9 The *Corporations Law* recognises the special statutory status of the listing rules. The court has the power to order compliance from any person 'under an obligation to comply with or enforce the ... listing rules' (s 777). The listing rules can be enforced on the application of the ASC and other third parties such as shareholders, none of whom are party to the listing agreement. Because of the *Corporations Law*, the listing rules are therefore enforceable against parties not party to the listing contract such as company directors, and associates of the listed company, even if they are not party to the listing agreement.

10 The *Corporations Law* gives the court the power to make orders if the listing rules are breached [s 1114(1)(b)].

Conclusion

Chapmans' case narrows the obvious and intended application of the ADJR Act to listing rules made under the authority of the *Corporations Law*. It is important that the next time the issue arises of whether ASX decisions made under the listing rules are subject to the ADJR Act, *Chapmans'* case be overruled or distinguished to confirm the obvious operation of the ADJR Act in this context. The cost of such extra review may be to diminish the flexibility and informality of rules and decisions made thereunder by the ASX, but the benefit of review under the ADJR Act is to provide listed companies with a further means of protecting their interests in the call for accountability by the ASX.[30]

28 Eg. *Corporations Law* s 111AP(2), 1001A.
29 ASX, above n 20, 1.
30 I.e. 'further' to judicial review at common law.