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Abstract
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Keywords
stock exchange rules, Corporations Law, section 777 Corporations Law, section 1114 Corporations Law

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ARTICLES

LEGAL ENFORCEMENT OF STOCK EXCHANGE RULES

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Introduction

Attention has been focused on the stock exchange rules by amendments made to sections 777 and 1114 of the *Corporations Law* in 1994, designed to *widen* the operation of the rules, and the decisions in *Chapmans'* case (1994-1995), which have *narrowed* their operation. This article analyses these developments, including the definition of "rules", and rejects the view expressed in *Chapmans'* case that the stock exchange Articles of Association are not part of the stock exchange's contract with a listed company. It supports the view that stock exchange decisions under the rules are subject to judicial review under Commonwealth administrative law because of their statutory significance, and that decisions under the rules import a duty to give reasons if required by fairness.

The regulation of stock exchange rules

Australia's State based stock exchanges, which may be traced back to private share trading clubs in the mid nineteenth century, were first regulated by the *Securities Industry Act* 1970 (NSW) and the comparable and partly parallel legislation passed in Victoria,[1] Western Australia[2] and

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1 *Securities Industry Act* 1970 (Vic), which repealed the *Stock and Share Brokers Act* 1958 (Vic) ("An Act to consolidate the Law with respect to the Keeping of Certain Books Accounts and Records by Members of Stock Exchanges and the Examination and Audit thereof"). This had repealed the *Stock and Share Brokers Act* 1937 (Vic), enacted to require the keeping of trust accounts, books, accounts and records by stock exchange members.

2 *Securities Industry Act* 1970 (WA).

Queensland[3] in response to the documented excesses of the mining boom of the late 1960's.[4]

At this time, the stock exchange Articles of Association and rules (hereafter "rules") were "the private rules of a private body".[5] Their drafting, monitoring and enforcement was the responsibility of the stock exchange as a private self-regulator.

Building on the abuses of self-regulation documented by the Rae Report in 1974, and recognising the public interest in the maintenance of an efficient, competitive and informed stock market, regulation was increased with the passing in 1975-1979[6] of the predecessor of sections 776, 777 and 1114. This legislation widened the enforcement of these rules beyond the parties to the contract by providing for enforcement by the Australian Securities Commission, the stock exchange and widely defined classes of persons "aggrieved".

Such a wide power of enforcement does not exist in equivalent United States or United Kingdom law, and Australian case law and statutory amendments in 1994 show the potential of this remedy for persons "aggrieved" such as shareholders, takeover bidders and listed companies to apply to the court to seek enforcement of the rules against the exchange, brokers, listed companies and their directors personally.

Role of stock exchange rules

The previous six State stock exchanges were privately incorporated as companies limited by guarantee and were regulated under the State legislation discussed above. They merged as one national stock exchange in 1987 under the name The Australian Stock Exchange Ltd (hereafter "stock exchange"), which is incorporated as a company limited by guarantee and operates in the context of regulation passed by the Commonwealth.[7] This Commonwealth legislation facilitates the creation of the stock exchange; it does not create it. Under its articles of association, the Directors of the stock exchange are authorised to make "Rules not inconsistent with these Articles for the order and good government of the Members or Member

3 *Securities Industry Act* 1971 (Qld).

4 Passed during the hearings of and before the release by the Senate Select Committee on Securities and Exchange of its report *Australian Securities Markets and their Regulation* (the Rae Report), AGPS (1974), discussed in Baxt R, *The Rae Report - Quo Vadis?* Butterworths (1974).

5 *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1986) 10 ACLR 801 at 812; (1986) ASLR ?76-110 at 85,137 per Kirby P.

6 *Securities Industry Act* 1975 (NSW); 1975 (Vic); 1975 (Qld); 1975 (WA); 1979 (SA) sections 30, 31, 12 respectively.

7 By *Australian Stock Exchange and National Guarantee Fund Act* 1987 (Cth), adding inter alia Part IIA to the then *Securities Industry Act* 1980 (Cth) and Codes, a Part not repealed by the *Corporations Law* but saved by *Corporations Act* 1989 (Cth) section 81. This paper uses the generic "stock exchange".

Organisations of the Exchange and its affairs".[8] The Australian Stock Exchange is different to other stock exchanges as it is a "stock exchange" by definition in *Corporations Law* section 9. As such, it does not have to fulfil the following rule requirements (although in practice it fulfils them all where appropriate).

Under the authority of the Corporations Law two volumes of rules have been made - the Listing Rules and the Business Rules:

1. Listing Rules. The Listing Rules,[9] controlling companies listed on the exchange, are required under *Corporations Law* section 769(2)(d) and (e) to make satisfactory provision for trading of securities and for the protection of the interests of the public including the provision of a fidelity fund. They aim at 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."[10] In the words of the stock exchange, these aims are based on four principles: (1) the listing and quotation principle, under which an entity must satisfy minimum standards of quality, size, operations and disclosure so as to trade in the market; (2) the need to keep the market informed under the market information principle; (3) ensuring that every listed entity operates to the highest standards of integrity, accountability and responsibility under the regulatory principle, and (4) commercial certainty as to the fulfilment of contractual obligations under the trading and settlement principle.[11]

2. Business Rules. The Business Rules[12] set out trading requirements, and as set out in *Corporations Law* section 769(2)(b), they must make satisfactory provision for qualifications for membership, compliance with and enforcement of the rules and exclusion of those below standard, and the conditions under which securities may be traded. The stock exchange recognises that the "Listing Rules ... are additional and complementary to companies' common law and statutory obligations".[13]

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8 *Articles of Association of Australian Stock Exchange Limited*, article 70.

9 As defined in *Corporations Law* section 761. Compare the definition of "business rules" in section 603 applicable to Chapter 6.

10 Australian Stock Exchange Limited, *The Role of the Australian Stock Exchange and its Listing Rules*, ASX Discussion Paper, 4 (October 1990).

11 Ibid. at 4-7; similarly Australian Stock Exchange Limited, *Listing Rules Simplification*, ASX Exposure Draft, 1-2 (April 1995).

12 As defined in *Corporations Law* section 761. Compare the definition of "business rules" in section 603 applicable to Chapter 6.

13 Australian Stock Exchange Limited Main Board Official Listing Rules, Foreword, reproduced in CCH *Australian Corporations and Securities Law Reporter*, ?350-000; compare The Law Commission, *Fiduciary Duties and Regulatory Rules*, Consultation Paper No 124, HMSO (1992); Report LAW COM No 26 (1995).

The Australian Securities Commission is not authorised to draft rules, and instead rules are drafted by the stock exchange itself often in consultation with the industry and the Commission. The role of the Minister (the Commonwealth Attorney-General) is effectively that of licensor through his or her statutory power of approval: approval as a securities exchange by the Minister through the Commission under *Corporations Law* sections 769 and 770 requires inter alia evidence of satisfactory business rules and listing rules. After approval, the Commission retains the power of disallowance of rule changes, as under *Corporations Law* section 774 it is to be notified of amendments to rules by way of rescission, alteration or addition.[14]

Unlike the situation in comparable legal systems, the Commission is not given an initiating role as it is not formally authorised to draft or to require the adoption of rules. The original *Securities Industry Acts* of 1970/1971 did not remedy the shortcomings found by the Rae Committee Report, ie, that stock exchange rules were inadequate especially regarding the regulation of members.[15] 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.[16] Under section 6(b)(1) of the *Securities Exchange Act* 1934 (US), an exchange must be able to enforce compliance with the rules by its members. Regulation of the British financial sector under the *Financial Services Act* 1985 (UK) is vested in the Secretary of State for Trade and Industry acting through the Department of Trade and Industry. The Act authorises the Secretary of State to transfer functions to a "designated agency" with the ability to regulate, and to date the only such agency is the Securities and Investments Board, a body with the power to authorise and to monitor self-regulating organisations and recognised professional bodies. In contrast to the Australian position, the *Financial Services Act* in ssection 47-56 does give 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.

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14 Section 774 does apply to the Australian Stock Exchange even though it is a "stock exchange" by definition in *Corporations Law* section 9. For example, nineteen notices of amendments to business rules and listing requirements were given to the former NCSC in 1989-1990: NCSC, *Eleventh Annual Report and Financial Statements*, AGPS, 44 (1989-1990). The Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders*, (the Lavarch Report), Canberra, AGPS (1991) recommended in its Recommendation 13 that the Attorney-General disallow alterations to the Listing Rules under section 774 which are not expressed in a language and style which both facilitates clear interpretation and increases the ability to enforce the Rules in court.

15 Rae Report, above n 4, Ch 15 ("The failings of existing regulators"). In debate in the NSW Legislative Council on the *Securities Industry Bill* 1975 (NSW), DP Landa quoted D Harding's comments on the importance of a rule making power for the regulator: Hansard, Legislative Council (NSW), 2 December 1975, 3385.

16 *Securities Exchange Act* 1934 (US) section 23(a)(1).

Definition of rules

The *Corporations Law* carries forward the separation introduced in the original *Securities Industry Acts* of 1970/1971 between business rules and listing rules. Many sections distinguish the rules.[17] Where there has been a breach of the business rules or the listing rules, section 1114 empowers the court to make the various orders enumerated.[18] In *FAI Traders Insurance Co Ltd v ANZ McCaughan Securities Ltd*, Cole J held that the term "rules" as used by the stock exchange was wider than just business rules and included the two classes carried over from the legislation and definitions in the Articles of Association if appropriate.[19] For the first time, the two sets of rules and the Articles were read together for the purposes of enforcement under former section 42 (now section 777).

In addition, it is submitted that in line with the dicta of Cole J in the *FAI* case just mentioned, the rules subject to enforcement under the *Corporations Law* include the stock exchange Memorandum and Articles. This view is consistent with the definition of "rules" in the 1970/1971 legislation, which stated that "*rules* in relation to a stock exchange means (the) rules governing the conduct of the stock exchange or the members thereof by whatever name called and wherever contained and includes rules contained in the memorandum of association and the articles of association of the stock exchange".[20] This definition was carried forward in the 1975/1979 legislation.[21] It is also consistent with what the stock exchange states in Article 70 of its Articles of Association that "the Board may make Rules not inconsistent with these Articles for the order and good government of the Members or Member organisations of the Exchange and its affairs". If the Articles are the authority for this rule-making power, the rules must be consistent with their source.

For example, the Memorandum confirms that every member of the exchange undertakes to contribute to its assets on winding up. The Articles set out obligations binding on members, including requirements on management, levies, exchange directors, meetings, exchange membership and conduct of business. In *Chapmans'* case, Beaumont J did not need to resolve the question of whether the Articles of the ASX were incorporated as part of the contract between the exchange and a listed corporation but did concede that "it would always be open to a court to infer that an article ... could be incorporated by reference, or otherwise picked up, as part of a

17 Such as *Corporations Law* sections 769(2), 774, 777.

18 Section 1114 replaced *Securities Industry Act* 1980 (Cth) and State Codes section 14, which had replaced section 12 of the 1975-1979 State legislation: see above n 6.

19 (1991) 9 ACLC 84 at 100; (1990) 3 ACSR 279 at 297; noted eg (1991) 9 C & SLJ 190; (1991) 65 ALJ 403; [1992] CLJ 209.

20 NSW section 4; Vic section 5; WA section 6; Qld section 4 "rules".

21 *Securities Industry Act* 1975 (NSW); 1975 (Vic); 1975 (Qld); 1975 (WA); 1979 (SA) section 4 ("business rules ... means rules ... contained in the memorandum of association or the articles of association [of the stock exchange]").

contractual arrangement between an exchange and a listed corporation".[22] He cited the *Kwikasair* case where Street J (as he then was) held that the Article in question "will form a part of any contract ... to conform with the specified listing requirement".[23] In principle, the Memorandum and Articles must be incorporated in the contract between the stock exchange and a listed company, and like the business and listing rules have statutory significance under the *Corporations Law*.

Rules as "the private rules of a private body"

Until the passing of the *Securities Industry Acts* in four States in 1970/1971 as mentioned above, the stock exchange rules were very much "the private rules of a private body".[24] They were drafted by the exchange with no outside scrutiny for the protection of the public interest and for the promotion of due and orderly dealings in shares, and they were - and still are - binding on listed companies in contract. In the words of Street CJ in 1972, persons buying shares in listed companies are entitled to expect directors faithfully to abide by the stock exchange rules, and directors who knowingly commit a breach of the rules are to be criticised for non-observance and "deserving of censure for their deliberate repudiation of the restraints placed upon them by these rules".[25] For the first time, the 1970-71 legislation introduced a limited statutory regime for the operation of stock exchanges and their rules with the forbears of sections 767, 769 and 774.

For a listed company, there is a contractual obligation - the "listing agreement" - to comply with the rules, independent of section 777, which is derived from acceptance of listing by the stock exchange and terms may be implied into this including those relevant from the Memorandum and Articles. This is a "highly unusual contract"[26] which gives the stock exchange power to change the rules and suspend 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".[27] 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.[28]

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22 *Chapmans Ltd v Australian Stock Exchange Ltd (No 1)* (1995) ACLC 1023 at 1025.

23 *Kwikasair Industries Ltd v Sydney Stock Exchange Ltd* (1968) ASLR ?20-570 at 30,708.

24 See above n 5.

25 *Ampol Petroleum Ltd v RW Miller (Holdings) Ltd* [1972] 2 NSWLR 850 at 882.

26 Spender P, 'The legal relationship between the Australian Stock Exchange and listed companies' (1995) 13 C & SLJ 240 at 241.

27 *Hole v Garnsey* [1930] AC 472 at 500, cited in *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699 at 704.

28 *Zytan Nominees Pty Ltd v Laverton Gold NL* (1989) 7 ACLC 153 at 156 per Malcolm CJ, noted (1989) 7 C & SLJ 211. The argument based on *Repco Ltd v Bartdon Pty Ltd*, see below n 31 and *Designbuild Australia Pty Ltd v Endeavour Resources Ltd*, see n 32 that a direction under section 42 (now section 777) 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*, see below n 74.

Section 777 of the *Corporations Law* now gives the rules statutory significance and widens the enforcement of the contract beyond the parties to the contract. The forebear of section 777, section 31, introduced for the first time in the *Securities Industry Acts* of 1975/1976 after the Report of the Rae Committee,[29] was intended to make compliance statutory as evidenced in the words of the second reading speech of the then NSW Attorney-General Mr Madison. The Minister's words parallelled the section and were unrestricted: "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."[30] In other words, the rules are no longer the rules of a private club.

Within six years of its enactment, the application of former section 31 was narrowed by the decision of the Victorian Full Court in *Repco Ltd v Bartdon Pty Ltd*[31] only to those "under an obligation to observe the listing rules" if "bound by contract ... by statute or subordinate legislation". This confirmed the statutory authority for compliance as the *Securities Industry Act*. However, the court held that without an obligation from one of these three sources, an unlisted company has no obligation to comply with the rules.

The effective operation of former section 31 was brought to an end in *Designbuild Australia Pty Ltd v Endeavour Resources Ltd*.[32] Powell J in the Supreme Court of New South Wales upheld submissions by counsel for the defendants that the then section 31 did not impose an obligation to comply with the rules on the defendant companies - public or proprietary, listed or unlisted. His Honour confirmed the earlier authority that "obligation" under former section 31 "if it exists at all" is found in a contract with the stock exchange and that an unlisted company could not be subject to any relevant "obligation".[33] Further, he held that unless the listing contract expressly or by necessary implication imposed on a listed company a positive obligation to observe the listing rules, "the mere fact that a company is a listed company does not mean that it is subject to a relevant 'obligation' for the purposes of section 31 of the Act".[34]

This paper argues that the view of the stock exchange through its counsel appearing in the *Designbuild* case as a submitting defendant

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29 Above n 4.

30 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).

31 [1981] VR 1 at 9; (1980) ASLR ?76-001 at 86,108 per Young CJ, Kaye and Jenkinson JJ; noted (1980) 54 ALJ 611. Action by one takeover bidder (Repco) against alleged failures by other bidders (unlisted proprietary companies and a foreign company) to comply with the then listing rules on takeovers was unsuccessful.

32 (1980) 5 ACLR 610; (1980) ASLR ?76-003.

33 At 634; applying *Repco v Bartdon*, above n 31 at 9-10.

34 Ibid.

represents the correct purposive interpretation of former section 31 (and now section 777).[35] This purpose is set out in the Preamble to the Act,[36] and in the Minister's second reading speech.

The obligation to comply with the rules, being a creation of contract under section 31 (now section 777), could only apply while an obligation is afoot. If a company is delisted, it is free of the section 777 obligation as the exchange is unable to enforce its rules. In contrast, and as confirmed by amendment in 1981,[37] a company while suspended remains under an obligation to comply with the rules.

Rules with "special statutory status": a deemed obligation to comply

The *Securities Industry Acts* of the four States of 1975/1976 were repealed on the coming into effect of the "co-operative scheme for companies and securities" in 1982.[38] To overcome the problem of "obligation", the replacement of section 31 of the *Securities Industry Act* 1980 (Cth) and State Codes section 42, added obligation in the sense of making actionable failure "to comply with" the business rules or the listing rules. Standing was also widened from the Commission or "person aggrieved" to give the stock exchange the statutory power to seek compliance with its rules through the courts. For the first time, a "deemed obligation" to observe and to give effect to the listing rules (not the business rules) was added in this first version of section 42(2).

This "deemed obligation" was a major step which has survived later amendments. The former section 42 overcame the need to establish obligation from contract, statute or statutory rule and it gave statutory recognition to the rules.

Section 42(2) was redrafted in 1981 to ensure its continued application to a public listed company even if its securities have been suspended from quotation.[39]

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35 A view also expressed by Black A, 'Judicial review of discretionary decisions of Australian Stock Exchange Limited' (1989) 5 Aust Bar Review 91 at 100.

36 "An Act to consolidate and amend the law with respect to the regulation and control of trading in securities, the licensing of persons dealing in securities and the establishment and administration by stock exchanges of fidelity funds": *Securities Industry Act* 1975 (NSW).

37 Below n 39.

38 Under which the six States by contract contained in the "Formal Agreement" agreed to pass legislation parallel to Commonwealth legislation passed for the ACT under the Commonwealth's Constitutional power to legislate for the ACT. Clause 64 of the proposed *Corporations and Securities Industry Bill* 1974 (Cth), which lapsed on the dissolution of the federal parliament in 1975, was narrower than section 31 as it applied only to the business rules.

39 Parliament of the Commonwealth of Australia, House of Representatives, *Securities Industry Amendment Bill (No 2) 1981 Explanatory Memorandum*, 1981, 16.

The section was amended again in 1985 by breaking the contractual and the deemed contractual connection by widening the section to catch a "person associated with a body corporate".[40] Section 42 became section 777 with the enactment of the *Corporations Law* in 1991, and remained in force until amendment in 1994.

The introduction of the "person associated" test in 1985 means that a court direction under section 777 is not limited to those obliged to follow the listing rules. As confirmed in the *FAI* case, an order of compliance with the rules can be expressed widely, and can be made against persons other than those under an obligation to comply by contract. The current view replaces the earlier "person who is under an obligation to comply" which had clearly narrowed the operation of section 42, but its replacement with "person against whom the order is sought" is not dependent upon the existence of a stock exchange listing contract. Hence orders can be made to third parties to ensure effective compliance with stock exchange rules, thereby confirming that *Repco* and *Designbuild* are no longer relevant.[41]

Section 777(2) of the *Corporations Law* imposes a statutory duty of compliance with the listing rules on a body corporate "or an associate of such body corporate". The *Corporations Law* in section 10-17 carries forward the wide definition of "associate" found in the earlier section 6 ("associated persons") of the *Securities Industry Act* 1980 (Cth) and Codes. Clearly, because an associate of a body corporate is "a director ... of the body" (section 11(a)), a director is deemed to be under an obligation equal to that of the body corporate to comply with the rules.

Section 777 was amended in 1994 to extend its operation and it now reads as follows:

Section 777 Power of Court to Order Compliance with or Enforcement of Business Rules or Listing Rules of Securities Exchange

(1) Where a person who is under an obligation to comply with or enforce the business rules or listing rules of a securities exchange fails to comply with or enforce any of those business rules or listing rules, as the case may be, the Court may, on the application of the Commission, the securities exchange or a person aggrieved by the failure and after giving to the person aggrieved by the failure and the person against whom the order is sought an opportunity of being heard, make an order giving directions concerning compliance with, or enforcement of, those business rules or listing rules to:

(a) that last-mentioned person; and

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40 Parliament of the Commonwealth of Australia, House of Representatives, *Companies and Securities Legislation (Miscellaneous Amendments) Bill 1985 Explanatory Amendment*, 189 (1985).

41 *FAI Insurances Ltd* (1986), below n 74, per Kirby P at 706-707 (Street CJ and Samuels JA contra), cited and approved by Macrossan J in *Hillhouse*, below n 42, 343.

(b) if that person is a body corporate - the directors of that body corporate.

(2) For the purposes of ssection (1), a body corporate that is, with its agreement, consent or acquiescence, included in the official list of a securities exchange, or an associate of such a body corporate, shall be deemed to be under an obligation to comply with the listing rules of that securities exchange to the extent to which those rules purport to apply in relation to the body corporate or associate, as the case may be.

The 1994 amendments widened the operation of section 777. They overcame the decision of the Supreme Court of Queensland in *Hillhouse v Gold Copper Exploration NL*,[42] which had introduced a new judicially created restriction on the otherwise clear and expansive words of former section 777 by introducing an unwarranted distinction between a duty imposed on directors personally and a duty imposed on the company of which they are directors. In the view of the shareholders, as tentatively upheld by the judge at first instance,[43] and confirmed on appeal by Macrossan J (in dissent),[44] former section 42 placed on the directors of the company an obligation to comply with the listing requirements on the basis that only the directors could give the supporting documentation with the notice of meeting. Only the directors possessed the relevant information and the directors were the persons causing the notice of meeting to be sent out.

In the view of the majority, because the obligations referred to in former section 42 and the listing rule, are placed on the company only,[45] an order cannot be directed to directors personally to do what they are not required by statute or the listing rule to do. This case had been soundly criticised,[46] and described as "technical and unrealistic"[47] as it surely avoids the fact that an order directed to the company would involve action by the directors. No such limitations restrict section 777 as it now reads.

Standing to enforce the rules

Section 777 of the *Corporations Law*, unmatched in United States or British securities regulation laws, carries forward the initiative introduced in the original *Securities Industry Act* of 1975/1979 when it gives standing to "the Commission, the securities exchange or a person aggrieved" to apply to the

42 [1990] 1 Qd R 207; (1989) 7 ACLC 332.

43 *Hillhouse v Gold Copper Exploration NL* (1988) 6 ACLC 346 per Dowsett J.

44 *Hillhouse v Gold Copper Exploration NL*, above n 42.

45 Ibid. per Andrews CJ at 337-338; Shepherdson J at 350.

46 eg Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (Lavarch Committee), above, n 14, Recommendation 14, as supported by Baxt R, 'Securities industry and stock exchange' (1992) 10 C & SLJ 146.

47 Baxt, above n 46 at 148.

court for an order concerning compliance with or enforcement of the business rules or the listing rules. Rights without the means of enforcing them means no rights at all, so section 777 provides a major grant of power to all parties interested. Section 777 overrides any restrictions which would otherwise be imposed by the doctrine of privity, as it authorises enforcement by a person who is not party to the contract.

The role of the court is to underwrite and to enforce the rules. The fact that it may be impracticable for the court to intervene where rules are in general terms does not go to jurisdiction but to discretion.[48] Enforcement by three parties is provided for in section 777:

Enforcement by the Commission

As watchdog, the Commission is involved in the process of rule making through the requirement in section 774 of notification of amendments to rules.[49] Section 777 recognises that the public interest requires that the Commission can require observance of the rules.[50] Without section 777, the Commission would not be able to enforce the business rules and the listing rules, and it is appropriate that the *Corporations Law* gives the Commission the power to enforce or to give effect to the rules as it was involved in drafting many of them.

Enforcement by the stock exchange

Similarly section 777 empowers the stock exchange to apply to the court for an order giving directions concerning compliance with or enforcement of the business rules or the listing rules. The amendments to the *Corporations Law* in 1994 now overcome the potential liability of the stock exchange for costs and/or damages.[51] This liability may have been one factor explaining why the stock exchange never brought proceedings under section 777 (or its equivalents) until this was passed.

Enforcement by a "person aggrieved"

The enfranchising of "the person aggrieved" in the *Corporations Law* is important and unmatched in comparable United States and British securities regulation. If there is the breach of a rule which has not been pursued by the Commission or by the exchange, or which has not been settled to the satisfaction of all concerned, action for enforcement may be commenced by a "person aggrieved". This is an important public interest

48 Per Street CJ in *FAI Insurances Ltd* (1986), below n 74 at 85,131.

49 As discussed in text accompanying n 14 above.

50 *Repco Ltd v Bartdon Pty Ltd*, above n 31, 86,108.

51 Section 779, as amended in 1994, widens the qualified privilege available to the stock exchange in disciplinary proceedings. The 1994 amendments also provide that in the case of an application for an order under section 1114, the Australian Stock Exchange Ltd is not required to give an undertaking as to damages: section 1114(3), as amended in 1994.

provision independent of a contractual relationship between parties[52] which allows a non-party to the stock exchange contract to enforce the stock exchange contract, thereby overriding privity of contract.

United States laws do not provide at all for private enforcement of exchange rule breaches, and case law tends against the existence of an implied cause of action for exchange rule breaches.[53] In contrast, section 62 of the *Financial Services Act* 1986 (UK) is comparable to section 777 in providing that contravention of any rules and regulations made by the Securities and Investments Board is actionable "at the suit of a person who suffers loss as a result of the contravention".[54] This right of action is restricted to a "private investor" as defined by regulation.[55] In addition, British case law recognises the right of a member of the public to get an order in the nature of mandamus to compel performance of rules, including those of the Panel on Take-Overs and Mergers.[56]

Section 777 was amended in 1994 to uphold the broad view of some case law which had taken a wide and purposive interpretation of the expression "person aggrieved" by deeming any person who "holds" securities of the body corporate to be a "person aggrieved".[57] Section 777(4) as amended reads:

> For the purposes of ssection (1), if a body corporate fails to comply with or enforce provisions of the business rules or listing rules of a securities exchange, a person who holds securities of the body corporate that are quoted on a stock market of the securities exchange is taken to be a person aggrieved by the failure.

Section 777(5) makes clear that "Subsection (4) does not limit the circumstances in which a person may be aggrieved by a failure for the purposes of ssection (1)."

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52 *Repco Ltd v Bartdon Pty Ltd*, above n 31, 86,108.

53 *Walck v American Stock Exchange, Inc*. 687 F.2d 778 (1982); discussed further in CCH *Federal Securities Law Reports* ?21,310, ?21,351.

54 Subject to the exemption in section 47A(3) in the case of statements of principle (such as the Securities and Investments Board's *Principles and Core Rules for the Conduct of Investment Business* issued in 1991: discussed further in Latimer P, 'Principles of investment business - an Anglo-Australian perspective' (1991) 17 Brooklyn Journal of International Law 577.

55 *Financial Services Act* 1986 (UK) section 62A; as defined in cl 2 of the *Financial Services Act 1986 (Restriction of Right of Action) Regulations* 1991 (UK), a "private investor" means an investor "otherwise than in the course of carrying on investment business" (in the case of an individual), and an investor "otherwise than in the course of carrying on business of any kind" (in the case of "any other person", including a company).

56 *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815; *R v Panel on Take-overs and Mergers, ex parte Guinness Plc* [1989] 2 WLR 863.

57 Specifically, para 214 of the *Corporate Law Reform Bill 1993 Explanatory Memorandum*, explains that section 777(4) was introduced to "overcome" the decision in *Robox Nominees Pty Ltd v Bell Resources Ltd* (1986) 4 ACLC 164, below n 68.

Fearing opening the courts to "busy-bodies", the courts from the 19th century had interpreted "person aggrieved" narrowly to require a personal, often economic, interest in the subject matter of the proceedings.[58] In contrast, and in line with sections 777(4) and (5), the Privy Council adopted the following broader test in 1961:[59]

> The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy-body who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

In the view of Kirby P (as he then was) in the *FAI* case (1986), standing as a "person aggrieved" "suggests to my mind that the Parliament intended thereby to secure protection of the general public interest, including the interests of the investing public amongst whom will be the existing shareholders of a listed company."[60] His Honour distinguished *Repco*[61] and *Designbuild*[62] as not binding because they concerned the now-repealed 1975 legislation. Indeed, the language of section 777 is so encompassing that it is doubtful whether the test of standing posed by the High Court in the *Conservation Foundation* case would be of relevance with its citation of earlier US authority to the effect that there must be more than a general concern for the issue - that "there must be 'injury in fact' to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated".[63]

The operation of section 777 should not be narrowed. In the words of Barwick CJ (as he then was), "the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action ... is clearly demonstrated ... great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of

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58 Eg, *Coles Myer Ltd v O'Brien* (1992) 28 NSWLR 525 at 527-530 per Kirby P (objector to liquor licence upheld as "person aggrieved" under *Liquor Act* 1982 (NSW) section 148). Illustrating the traditional rule: a person to be examined by liquidator held not to be a "person aggrieved" under Corporations Law section 1321 and therefore not entitled to copy of the affidavit filed in support of the application for an examination order as none of his legal rights had been infringed by the refusal to deliver him a copy thereof: *Re Western Continental Corporation Ltd (in liq)*; *Strapp v Fear* (1991) 9 ACLC 1276.

59 *Attorney General of the Gambia v Pierre Sarr N'Jie* [1961] AC 617 at 634. This common law test is re-stated in the definition of "person aggrieved" in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) section 3(4) ("a person whose interests are adversely affected by the decision"), discussed further by Allars M, 'Standing: the role and evolution of the test' (1991) 20 FLR 83.

60 See below n 74, 85,135 - 85,136; also 85,137.

61 Above n 31.

62 Above n 32.

63 *Sierra Club v Morton* 405 US 727 (1972) at 733, cited in *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493 at 539-540; (1979) 54 ALJR 176 at 185 per Stephen J. The Conservation Foundation case was cited by counsel for the successful defendants in the *Designbuild* case, above n 32.

his case".[64] In the words of Magarey, "Just what outsiders may be covered (by section 777) is yet to be tested."[65]

There is now a large body of case law concerned with the question of who is a "person aggrieved" under *Corporations Law* section 777 and its predecessors:

A shareholder: Shareholders have been the main litigants to date under section 42, the predecessor to section 777, although in the view of Kirby P, a "person aggrieved" is wider than a shareholder and includes the "investing public".[66] Some shareholder cases have not queried if any percentage of share capital is required to constitute a "person aggrieved",[67] but case law had stated that not every shareholder is an aggrieved person. For example, Olney J in *Robox Nominees Pty Ltd v Bell Resources Ltd*[68] interpreted the reference in the section to "a person aggrieved" instead of to "a shareholder" to indicate a limitation on who has standing to sue and read into former section 42 the need for commercial prejudice to the interests of the plaintiff suffered by any failure to observe the listing rules. Hence the owner of 18.2% of the issued capital of the defendant clearly passed this commercial prejudice threshold.[69] Specifically, the Explanatory Memorandum stated[70] that the insertion of ssection 777(4) and (5) was made to "overcome" the decision in *Robox Nominees*.

The amendments to section 777 also overcome the decision of the Supreme Court of South Australia in *Niord Pty Ltd v Adelaide Petroleum NL*, which had stated without any authority that an "aggrieved person" must be a shareholder at the time of the "aggrievement" and that therefore a person who later becomes a shareholder cannot enforce the rules in a period when it was not a member.[71]

Takeover bidder: Not every "aggrieved person" is a shareholder, and takeover bidders have frequently alleged breaches of the stock exchange rules by target companies in the course of takeover defences. For example, breach of Listing Rule 3R(3) and bad faith on the part of directors was alleged by a bidder in *Tavola Pty Ltd v South Eastern Petroleum NL* by

64 In *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129, 130, cited in *Wallaroy Pty Ltd v United Motors (Holdings) Ltd* (1987) ASLR ?76-108 at 85,113.

65 Magarey D, 'Enforcement of the Listing Rules of the ASX' (1995) 13 C & SLJ 6 at 18.

66 FAI case (1986), below n 74, at 85,136 per Kirby P.

67 Eg, *Devereaux Holdings Pty Ltd v Pelsart Resources NL* (1985) ASLR ?76-103 (plaintiff held 2,000 shares in the defendant listed public company with issued capital of some 121m 20 cent shares); *FAI Insurances Ltd v Pioneer Concrete Ltd* (1986) 10 ACLR 801; (1986) ASLR ?76-110; *Zephyr Holdings Pty Ltd v Jack Chia (Australia) Ltd* (1989) 7 ACLC 239 (plaintiff held some 14% of defendants' share capital); *TNT Australia Pty Ltd v Poseidon Ltd* (1989) 7 ACLC 303 (plaintiff a "substantial shareholder" [ie 5% or more] in defendant).

68 (1986) 4 ACLC 164 (plaintiffs the holder of 200 shares in company with capital of over 126m shares).

69 *Equiticorp Industries Ltd v ACI International Ltd* [1987] VR 485; (1986) ASLR ?76-107.

70 *Corporate Law Reform Bill 1993, Explanatory Memorandum*, para 213.

71 (1990) 54 SASR 87; (1990) 8 ACLC 684.

a share issue three weeks before the lodging by the plaintiffs of a Part A takeover scheme.[72] In *Wallaroy Pty Ltd v United Motors (Holdings) Ltd*,[73] an interlocutory application for an order that an action be listed for early trial was granted to a bidder to examine alleged improper share dealings allegedly in breach of the exchange rules. Similarly, in *FAI Insurances Ltd v Pioneer Concrete Services Ltd*,[74] the holder of some 16% of the issued shares of a target, who had announced that a takeover offer was to be made, secured a temporary interlocutory injunction to allow an application to the Equity Division for interlocutory relief to restrain the target issuing shares allegedly in breach of Listing Rule 3R(3). Breach of Listing Rule 3J(3) was alleged by takeover bidders in *Zytan Nominees Pty Ltd v Laverton Gold NL*[75] (that no statutory meeting had been held) and in *FAI Traders Insurance Co Ltd v ANZ McCaughan Securities Ltd*[76] (that the expert report did not establish the purchase was fair). In this case, action was brought by a listed company (a seller of shares) against its broker for payment for the shares after settlement did not proceed following stock exchange intervention on the basis of breach of the Listing Rule 3J(3). The broker, presumably as "any other person", successfully contended that because of the then section 42 (now section 777), the buyer and seller had contracted upon the implied term that the transaction was subject to compliance with the stock exchange rules.

Orders available under section 777

In the words of section 777(1), the court may make an order against "a person who is under an obligation to comply ... giving directions concerning compliance with, or enforcement" of the business rules or listing rules (and the Memorandum and Articles of Association of the exchange).

Section 777 does not constitute a code limiting the powers of the court and the court, being a superior court of record of unlimited jurisdiction, has the power to use all the powers generally available to it.[77] The scope of remedies is left to the court by the use of the word "concerning" in section 777(1) and a restrictive interpretation contradicts the words of the section.[78] The power of the court includes an order for specific performance, although some rules are very general and may not be capable of explicit enforcement, whereas others clearly attract the court's discretion.[79] The court has a wide

72 (1985) ASLR ?76-102. Oral notice to the directors was held not to satisfy the requirements of Rule 3R(3). Mala fides on the part of the directors would not have been established on the material before the court.

73 (1986) ASLR ?76-108.

74 (1986) 4 ACLC 698; (1986) 10 ACLR 801; (1986) ASLR ?76-110.

75. Above n 28.

76 Above n 19.

77 Per Powell J in *Designbuild*, above n 32 at 633 in reference to section 31 of the former *Securities Industry Act* 1975 (NSW).

78 Magarey, above n 65 at 20, rejecting the narrow interpretation given in *Australian Corporations Law, Principles and Practice*, Butterworths (1991), looseleaf, para 10.1.1665.

79 *FAI Insurances Ltd v Pioneer Concrete Ltd*, above n 74 at 85,131 per Street CJ.

discretion in the exercise of its powers to give directions - such as a direction to deliver a report as required under the rules - a discretion to be exercised "in a judicial manner and not capriciously".[80]

Section 777 authorises action when there has been a failure to comply with the rules. Case law is divided on whether a threatened breach - anticipatory breach - of the rules can give rise to an action under section 777. Certainly a transaction in breach of the rules could be reversed by an order under the section, even though the completed transaction would be valid between the parties.[81] The judge at first instance in the *FAI Insurances* case held that former section 42 was not available to cure a breach of the listing rules which had occurred, and that it was "irremediable" because once breached, no further orders could be made to ensure compliance.[82] On that interpretation, a breach would now only be actionable under the equivalent of *Corporations Law* section 1114.

Section 1114 overlaps section 777 when it authorises the court to make certain orders on the application of the Commission, a securities exchange or (following amendment in 1994) a person aggrieved where a person has contravened (section 1114) or has failed to comply etc with (section 777) the rules. "Person aggrieved" is defined in section 1114(1A) as "a person who holds securities of the body corporate that are quoted on a stock market of the securities exchange". Whereas section 777 applies to non-compliance, section 1114 goes further as it applies to a threatened contravention as well as to an actual contravention. In contrast to section 777, section 1114 gives the court wide powers over person and property with the power inter alia to restrain acquiring, disposing or dealing with securities, the power to appoint a receiver over property, the power to declare a contract void or voidable.

The business rules coupled with section 777 in fact amount to an alternative dispute resolution procedure, involving all the remedies open to the courts. In *Norths Ltd v McCaughan Dyson Capel Cure Ltd*,[83] Young J refused to recognise this wide scope of former section 42 (now section 777). Recognising the scope of the section, his Honour's earlier formulation of this narrow view in the first *FAI* case (1986) at first instance,[84] while upheld on appeal by Jacobs JA, "may be too restrictive a statement of the range of jurisdiction under section 42".[85] It was not followed by Kirby P in the first *FAI* case.

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80 *Robox Nominees Pty Ltd*, above n 68 at 165-166 per Olney J.

81 *Zytan Nominees Pty Ltd v Laverton Gold NL*, above n 28, 75 at 157, canvassing the issue without judgment.

82 *Fire & All Risks Insurance Co Ltd v Pioneer Concrete Services Ltd* (1986) 10 ACLR 760 at 766 per Young J; a view not adopted by the Full Court at (1986) ASLR ?76-110 at 85,130.

83 (1988) 6 ACLC 320.

84 See above n 82.

85 FAI case, above n 82 at 85,130 per Street CJ.

The jurisdiction of the court is wider than a direction of compliance with the rules and is wider than an order to a person under an obligation to comply for example with the listing rules,[86] and it is directed to "the person against whom the order is sought" rather than "a person who is under an obligation to comply". The order is "concerning compliance", and can be directed to third parties such as allottees and a securities exchange.[87] As in the second *FAI* case, the order can be directed to a broker to comply with the business rules.[88]

Decisions of the stock exchange are subject to judicial review

Stock exchange contracts contained in the business rules and the listing rules are more than the private rules of a private body because of their statutory significance under *Corporations Law* sections 776, 777 and 1114. It is submitted the stock exchange's argument in *Chapmans'* case[89] that its relationship with the listed company is purely contractual and is not susceptible to judicial review cannot be sustained under the *Corporations Law* or at common law. Decisions of the stock exchange are subject to judicial review under Commonwealth administrative law (review on the merits) and at common law (especially if unjust or for error of law): "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".[90]

The "covering" provisions of the *Corporations Law* ensure that Commonwealth administrative laws apply in relation to the *Corporations Law* of each State and Territory jurisdiction.[91] The *Administrative Decisions (Judicial Review) Act* 1977 (Cth) applies to decisions made under an "enactment" (section 3), but case law recognises a distinction between a decision made under a contract which is made under a power given in an Act, and a decision made under such "enactment".[92] This distinction was upheld by Beaumont J in *Chapmans'* case when he held that because the listing rules derive their force and effect from the law of contract rather than from the relevant legislation, they were not made under an "enactment" within the meaning of the Act. It is true that Part IIA of the *Securities Industry Act* 1980 (Cth), saved by the *Corporations Act* 1989 (Cth), novated all listing agreements and wrote them into the *Corporations Law* and that, as discussed above, the Australian Stock Exchange was facilitated, not

86 *FAI Insurances Ltd*, above n 74 per Kirby P, in contrast to *Repco Ltd v Bartdon Pty Ltd*, above n 31 at ASLR 86,108 (need for contractual obligation).

87 Ibid.

88 *FAI Traders Insurance Co Ltd v ANZ McCaughan Securities Ltd*, above at n 19.

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

90 Eg, Black A, 'Judicial review of discretionary decisions of the Australian Stock Exchange Limited' (1989) 5 Aust Bar Review 91 at 91.

91 The effect of sections 34-39 of the *Corporations [name of State] Act* 1990 and *Corporations Act* 1989 (Cth) sections 45A-45E is to provide that Commonwealth administrative laws apply to State laws "as if" they were Commonwealth laws.

92 Eg, Pearce DC and Allars MN, *The Australian Administrative Law Service*, Butterworths (1978), para [317A].

created, by this legislation. Because of their statutory significance, it is not true to say that the stock exchange rules are not an "enactment".

"Enactment" is defined in section 3 to mean Commonwealth legislation or in ssection (c) "an instrument (including rules, regulations or by-laws) made under such an Act". It is submitted that the rules, which have the capacity to affect legal rights and which can be altered by the authority by which it has been produced, clearly fall within the term "instrument" for the purposes of the Act.[93]

In view of its public role, *Chapmans'* case recognised that the stock exchange is required to act fairly and to give a listed company a reasonable opportunity to be heard in relation to listing decisions.[94] Because proprietary rights are affected, there is prima facie a requirement that procedural fairness be accorded. This involves the duty to give reasons if fairness so requires, which is subject to judicial review at common law.[95]

Conclusion

The contracts between the stock exchange and a listed company (listing rules) and the contracts between the stock exchange and its members (business rules) have statutory significance going beyond the terms of those contracts. Action under the contract is subject to judicial review under legislation and at common law. The operation of section 777 is important in providing for the enforcement of stock exchange rules (including the stock exchange's Memorandum and Articles) by parties beyond self-enforcement by the self-regulated. Access to the courts by the Australian Securities Commission, the stock exchange or a person aggrieved is an important initiative unmatched in the United States or the United Kingdom in the enforcement of stock exchange rules.

93 See also Brewster D, 'Decisions under the Australian Stock Exchange Listing Rules: review under the Administrative Decisions (Judicial Review) Act' (1991) 9 C & SLJ 377 at 387-388 and authorities cited therein.

94 *Chapmans Limited v. Australian Stock Exchange Limited (No 2)* (1995) 13 ACLC 1026.

95 Black A, 'Judicial review of discretionary decisions of Australian Stock Exchange limited' (1989) 5 Aust Bar Review 91.